Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

FIRST REPORT

1985-1986

Ontario

INTRODUCTION BY THE CHAIRMAN

In the writing of this, my first report as Chairman of the Workers' Compensation Appeals Tribunal, my role as trustee of a concept others laboured long and hard to create has been much in my mind. And to those in the worker and employer constituencies, in the ranks of legislators, in government, and at the Workers' Compensation Board, whose project this was long before my appointment, I should like to say here at the outset how much I hope that in this report most of you will find reason to feel that the trust was not misplaced.

The report chronicles an experience, the like of which neither my colleagues nor I ever imagined. It has been incredibly demanding. Also, however, at both personal and professional levels it has been enormously challenging and wholly satisfying. It is an experience none of us would have missed.

It would be naive to think, in the highly charged atmosphere of workers' compensation in Ontario, that a new Appeals Tribunal would be anything but controversial. Frankly, I would be disturbed were we, at this stage, attracting unabashed support from either the worker or employer camps. There is not, I gather, much danger.

It is my belief, however, that, on balance, we have done well. The Tribunal is on its feet, doing, in my opinion, what the legislation requires it to do, and operational at a level that should see the large transitional backlog gone by the end of 1987. I am personally satisfied that, so far, we have met our responsibilities.

The achievement which, to my mind, is evidenced by this report is the achievement of a large number of highly committed and talented Tribunal members and staff. To apportion credit fairly amongst that group is, of course, not possible, and it would be inappropriate in any event in these pages to try. There is, however, one person who must share with the Chairman responsibility for what the Tribunal has done and what it has become. I refer to my Alternate Chairman, James R. Thomas, who has been a partner with me throughout this undertaking.

This report is the Chairman's first report to the Minister of Labour and to the Tribunal's various constituencies. It is more detailed and comprehensive than would be typical of an annual report in usual form. However, I thought it essential at this point in the Tribunal's development to provide the Tribunal's constituencies with a sufficient basis for understanding what the Tribunal looks like, in the flesh, as it were, after twelve months of life, and for assessing the quality and character of its performance to date.

S.R. Ellis
Toronto, Ontario
October 5, 1986

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A. REPORTING PERIOD

The Appeals Tribunal was legislated into existence on October 1, 1985, but it was January, 1986, before it could be said to be operational at any significant level. A few hearings were held in November and December, but until January the main effort was organizational. Because an annual report in traditional format would report as of the end of March, 1986 — the end of the Tribunal's 1985/86 fiscal year — it would in these circumstances cover only the first three months of the Tribunal's effective operating period. A three-month reporting period would not provide meaningful data, and it was the Chairman's view that a report covering that period would not satisfy the pressing interest within the Tribunal's various constituencies for early information adequate for assessing the Tribunal's developing nature and potential.

In response to the foregoing considerations, this First Report has been written covering the twelve months of the Tribunal's existence, from October 1, 1985, to September 30, 1986. It is planned that the Second Report will revert to the standard format and will cover the Tribunal's 1986/87 fiscal year.

B. THE CREATION OF THE TRIBUNAL

The Workers' Compensation Appeals Tribunal is a "tripartite" tribunal with representation from the worker and employer constituencies. It was established in October, 1985, to hear and determine appeals under the Ontario *Workers' Compensation Act*. It is an independent tribunal separate and apart from the Workers' Compensation Board itself. The Appeals Tribunal takes the place of the Workers' Compensation Board's internal Appeal Board as the final level of appeal to which workers and employers may bring disputes about Workers' Compensation Board decisions.

The Tribunal is one part of a package of structural changes introduced in Bill 101. The package included:

(1) a new Board of Directors for the Workers' Compensation Board with representation from business, workers, the professions and the public;
(2) a roster of medical practitioners appointed by the Provincial Government to advise the Appeals Tribunal on medical matters;
(3) an Industrial Disease Standards Panel, representative of the public and the scientific community and also of technical and professional persons, to investigate occupational disease and determine standards for claims; and
(4) consultative and advisory services for employers and workers to be established by the Ministry of Labour called, respectively, the Office of the Employer Adviser and the Office of the Worker Adviser.

The Bill 101 changes as amended by legislative debate were enacted by Statute of Ontario, 1985, c. 3. A portion of that Act was proclaimed on April 1, 1985, and the balance on October 1, 1985. The amendments creating the Appeals Tribunal were included in the October proclamation.

C. THE IMMEDIATE PAST

Between 1914, when the first workmen's compensation legislation in Ontario was enacted, and 1985, there had been few structural changes in the Ontario compensation system. Beginning in the early 70s the need for structural change was increasingly the subject of public debate and in 1980 Professor Paul C. Weiler was commissioned by the Minister of Labour to undertake a study of the workers' compensation system. Professor Weiler's first report entitled *Reshaping Workers' Compensation for Ontario* was delivered in 1980. With this report as a touchstone, but without fully accepting its recommendations, the Minister of Labour tabled a *White Paper on the Workers' Compensation Act* in June, 1981. In 1982 and 1983, the Ontario Legislature's Standing Committee on Resources Development reviewed the White Paper and considered extensive submissions from employer and worker organizations. The Standing Committee reported in December, 1983. In the meantime, in April, 1983, Professor Weiler submitted his second report entitled *Protecting the Worker from Disability: Challenges for the Eighties*. The Minister of Labour's conclusions concerning the necessary reforms were subsequently presented to the Legislature in the form of Bill 101, and in 1985, after extensive legislative consideration and many adjustments, a Statute was passed incorporating the structural changes previously described.

D. THE MEMBERS OF THE TRIBUNAL

Chairman

S. Ronald Ellis
Mr. Ellis is the Tribunal's first Chairman. He assumed office on October 1, 1985. Mr. Ellis, who trained and practised as an engineer before going to law school, was formerly a partner in the Toronto law firm of Osler, Hoskin & Harcourt. More recently, he was a faculty member at Osgoode Hall Law School where he was Director and then Faculty Director of Parkdale Community Legal Services. He came to the Tribunal from his position as Director of Education and Head of the Bar Admission Course for the Law Society of Upper Canada. In addition, Mr. Ellis has significant experience as a labour arbitrator.

Alternate Chairman

James R. Thomas
Mr. Thomas was appointed to the Tribunal as a Vice-Chairman, effective October 1, 1985, and was assigned by the Chairman to the position of Alternate Chairman. A lawyer with a degree in electrical engineering, Mr. Thomas worked with Canadian General Electric before entering the legal profession. His experience with C.G.E. included six years in managerial positions at one of its manufacturing facilities. He was called to the Bar in 1983. Prior to joining the Tribunal, he had extensive involvement with workers' compensation matters, both through his law practice and his work with community clinics. The position of Alternate Chairman is not one that is defined by the Tribunal's legislation. It is a management position created by the Chairman as a means of sharing the administrative and management load that devolves on the Chairman's Office. The title was chosen to reflect the senior nature of the position and the fact that the incumbent is also the Vice-Chairman appointed by the Chairman — pursuant to provisions in the legislation in that respect — to act in place of the Chairman in the event of the Chairman's absence from the Province or his inability to act. The Alternate Chairman, like the Chairman, has both a management and an adjudicative role.

Full-Time Vice-Chairmen

Laura Bradbury
Ms. Bradbury was appointed to the Tribunal effective October 1, 1985. Called to the Bar in 1979, she acted as counsel for injured workers and, for the two years prior to her appointment, was an investigator with the Office of the Ombudsman.

Nicolette Catton
Ms. Catton was appointed to the Tribunal effective October 1, 1985. A graduate in sociology, she was with the Office of the Ombudsman for nine years prior to her appointment. From 1978 to 1985, she was in charge of the Ombudsman's Workers' Compensation Directorate.

Faye W. McIntosh-Janis
Ms. McIntosh-Janis was appointed to the Tribunal effective May 14, 1986. She was called to the Bar of Ontario in 1978, and was a full-time member of the Research Department at Osler, Hoskin & Harcourt for six years. She comes to the Tribunal from the position of Senior Solicitor with the Ontario Labour Relations Board.

Elaine Newman
Ms. Newman was appointed to the Tribunal effective July 9, 1986. Called to the Bar in 1979, Ms. Newman was previously senior staff lawyer with the Advocacy Resource Centre for the Handicapped in Toronto. She joined the Tribunal originally in October, 1985, in the position of senior lawyer in the Tribunal's Counsel Office.

Kathleen O'Neil
Ms. O'Neil was appointed to the Tribunal effective January 22, 1986. She was a lawyer with the Ontario Nurses' Association, and with the Federation of Women Teachers' Association. Prior to her appointment, she practised with the firm of Symes, Kitely & McIntyre. She has also chaired the Justice Committee of the National Action Committee on the Status of Women.

Antonio Signoroni
Mr. Signoroni was appointed to the Tribunal effective October 1, 1985. A practising lawyer since 1982, Mr. Signoroni had ten years experience as a part-time chairman of the Board of Referees of the Unemployment Insurance Commission. Before entering the legal profession he was involved extensively with service to the Italian community. He was a Trustee on the Metro Separate School Board from 1980 to 1982.

Ian Strachan
Mr. Strachan was appointed to the Tribunal effective October 1, 1985. Called to the Bar in 1971, Mr. Strachan's law practice involved advising small businesses with respect to a variety of commercial matters and employee-related issues. He has also served as a director of the Canadian Organization of Small Business.

Members Representative of Employers and Workers: Full-Time

Robert Apsey
Mr. Apsey was appointed to the Tribunal as a Member representative of employers effective December 11, 1985. He held a number of responsible positions at Reed Stenhouse during his 25 years with that firm until his early retirement in 1983, as a Vice-Chairman of the Board and Senior Vice-President.

Brian Cook
Mr. Cook was appointed to the Tribunal as a Member representative of workers effective October 1, 1985. A graduate of the University of Toronto, Mr. Cook was a community legal worker with the Industrial Accident Victims Group of Ontario for five years.

Sam Fox
Mr. Fox was appointed to the Tribunal as a Member representative of workers effective October 1, 1985. A past president of the Labour Council of Metropolitan Toronto, Mr. Fox is a former Co-Director and International Vice-President of Amalgamated Clothing and Textile Workers Union.

Karen Guillemette
Ms. Guillemette was appointed to the Tribunal as a Member representative of employers effective July 2, 1986. Ms. Guillemette has been the Administrator of Occupational Health at Kidd Creek Mines Limited in Timmins, and has been an active member of the Ontario Mining Association. Prior to her position as Administrator, she was the Industrial Nurse at Kidd Creek Mines.

Lorne Heard
Mr. Heard was appointed to the Tribunal as a Member representative of workers effective October 1, 1985. With more than 30 years of experience in workers' compensation matters, Mr. Heard came to the Tribunal from a 13-year career with the United Steelworkers of America where he had national responsibility for occupational health and safety, and workers' compensation.

W. Douglas Jago
Mr. Jago was appointed to the Tribunal as a Member representative of employers effective October 1, 1985. Mr. Jago had been Managing Director of Brantford Mechanical Ltd., and President and principal owner of W.D. Jago Ltd., both mechanical contracting concerns. He was an active member of the Mechanical Contractor's Association.

Frances Lankin
Ms. Lankin was appointed to the Tribunal as a Member representative of workers effective December 11, 1985. For five years prior to her appointment, she was the Research/Education Officer for the Ontario Public Service Employees Union. She was also that union's equal opportunities coordinator.

David Mason
Mr. Mason was appointed to the Tribunal as a Member representative of employers effective October 1, 1985. Mr. Mason came to the Tribunal following a number of years as an industrial relations personnel manager with Rio Algom Ltd.

Nick McCombie
Mr. McCombie was appointed to the Tribunal as a Member representative of workers effective October 1, 1985. His move to the Tribunal followed seven years service as a legal worker at the Injured Workers' Consultants legal clinic in Toronto.

Kenneth Preston
Mr. Preston was appointed to the Tribunal as a Member representative of employers effective October 1, 1985. A graduate chemical engineer, Mr. Preston was Director of Employee Relations for Union Carbide for ten years and Vice-President of Human Resources for Kellogg Salada for three years.

Jacques Seguin
Mr. Seguin was appointed to the Tribunal as a Member representative of employers effective July 1, 1986. Mr. Seguin was Chairman of the Softwood Plywood Division of the Canadian Hardwood Plywood Association C.L.A. and Vice-President of CHPA from 1981 to 1983, and retired from Levesque Plywood Limited as General Manager in 1984.

Note: There are currently six members representative of employers and only five members representative of workers. This imbalance will be corrected in the near future.

Resumes for all part-time Vice-Chairmen and Members may be found in *Appendix A* (Green).

E. THE TRIBUNAL'S JURISDICTION AND ITS LIMITS

The amended *Workers' Compensation Act* mandates the Appeals Tribunal to hear and determine worker or employer appeals from final decisions of the Workers' Compensation Board Appeals Adjudicators (now Hearings Officers) concerning entitlement to benefits, health care and vocational rehabilitation. The mandate also includes hearing and determining employer assessment appeals.

In addition to hearing appeals, the Tribunal has been given jurisdiction over a number of other matters. These include deciding in a particular case whether a worker's right to sue in the Province's civil courts has been taken away by the *Workers' Compensation Act*; determining disputes over employers' access to workers' files, and dealing with workers' objections to medical examinations requested by employers.

Finally, the Tribunal is required to hear and determine applications for leave to appeal which may be brought by workers or employers in respect of old WCB Appeal Board decisions. Leave is to be granted in the circumstances where it can be shown that there is substantial new evidence not previously available or where the Appeals Tribunal is satisfied that there is "good reason to doubt" the correctness of the decision.

Subject to the WCB Board of Directors' right to review interpretations of policy and general law (described below), the Tribunal's decisions are final. They are shielded from court review by the same "privative" clause that has always shielded WCB decisions.

To ensure that the creation of the Tribunal does not diminish the role of the WCB itself in the initial consideration and determination of any issue, the amended Act requires that the Appeals Tribunal not hear, determine or dispose of an appeal unless the procedures established by the Board for consideration of the issues in the appeal have been exhausted and the Board has made a final decision on such issues.

The Act gives the Tribunal essentially the same instructions it gives the Board. These include the instruction to make decisions on cases within its jurisdiction on the real justice and merits of the case and not to consider itself bound to follow strict legal precedent. The Act also gives the Tribunal similar powers of investigation and determination. The Tribunal is, as well, empowered to "make any order or direction that may be made by the Board".

The Tribunal was required at the outset of its existence to decide in the light of those instructions and powers the nature of the "appeal" contemplated by the legislation. Its decision in that respect may be seen in the Technical Appendix to its *Interim Decision No. 24* and reads as follows:

> The assumption at the root of the Tribunal's process design is that the "appeal" function contemplated for the Appeals Tribunal by the revised Workers' Compensation Act is not an "appeal" in the traditional sense of the term but is, rather, a process of rehearing. It is a process in which, in reviewing the issues relevant to an appeal, the Tribunal is mandated to consider again the same evidence considered at the final WCB appeal level and to hear new evidence, including, in appropriate cases, evidence obtained by the Appeals Tribunal on its own initiative.

The explanation of that view of the nature of appeals to the Appeals Tribunal is set out at length in the above-mentioned Technical Appendix. That explanation also provides a detailed overall description of the Tribunal's role as perceived by the Tribunal. Interested readers will find a copy of the Technical Appendix in *Appendix B* (Yellow).

Finally, as mentioned above, the Appeals Tribunal's jurisdiction to make final decisions is subject to a right of review by the WCB's new, representative, Board of Directors. The Board of Directors is entitled to review any Appeals Tribunal interpretation of the "policy and general law" of the *Workers' Compensation Act*. Section 86n of the Act is the applicable provision in that respect. The section has not been invoked to date.

F. THE TRIBUNAL'S ASSIGNMENT

In reviewing a WCB decision which is within the Tribunal's jurisdiction, the Tribunal has understood its assignment under the Act to be generally to ask and to answer the following questions:[1]

1. Did the Board get the facts right?
2. Did it get the medical facts right?
3. If so, is the Board's conclusion concerning the consequences which follow from those facts based on a correct interpretation of the Act?
4. If the answer to any of these questions is "no", what consequences does the Act specify, given the correct conclusions on the facts?

The decisions appealed from often rely on the terms of written directives and guidelines which the Board provides for the guidance of its staff. These directives and guidelines specify concrete consequences for particular fact situations. Their purpose may be seen to be to provide, for the guidance of Board staff, the Board's interpretation and explanation of what the Act requires and, where the Act leaves to the Board an area of discretion, information as to how the Board wants the discretion exercised.

In cases where the Board decision under appeal is based on a directive or guideline, assuming no disagreement on the factual or medical issues, the ultimate question for the Tribunal remains the same: Does the decision comply with the Act? The Tribunal is not intent on reviewing Board directives or guidelines from a policy perspective but it must, as a threshold matter, satisfy itself that the directive or guideline in question is not incompatible with the requirements of the Act.

G. A MAJOR DIFFERENCE BETWEEN THE APPEALS TRIBUNAL AND THE FORMER APPEAL BOARD

Evaluations of the Appeals Tribunal's performance in its early months of existence tend, naturally enough, to compare its work with that of the Appeal Board which it replaced. Such comparisons often appear, however, not to take account of differences in the respective roles of the two institutions. Of major significance is the inherent difference in their intrinsic approach to questions involving the interpretation of the actual wording of the Statute itself.

It is not, one thinks, widely appreciated that the Appeal Board was not a separate entity within the WCB's own organizational structure. The pre-Bill 101 Act did not specify an "Appeal Board" as such. The words "Appeal Board" did not appear in the Statute. The Act provided that appeals would be heard by the Vice-Chairman of Appeals and Appeals Commissioners — all members of the WCB's governing body. The governing body was composed of Commissioners appointed by the Lieutenant Governor in Council amongst whom were included the Vice-Chairman of Appeals and the Appeals Commissioners. In addition to their responsibilities for sitting on appeals, the Act gave the Vice-Chairman of Appeals and the Appeals Commissioners the same responsibilities as other Commissioners, as members of the Board's governing body, for transaction of the Board's normal business.

In short, the "Appeal Board" was an administative framework for organizing the processing of appeals. The appeals themselves were, in fact, heard and determined by the governing body of the WCB itself through panels of specially designated Commissioners.

The fact that it was members of the governing body who heard and determined appeals is of particular interest with respect to cases involving issues concerning the meaning of the Act itself. In most cases, there would exist an established WCB view of the meaning of the Act. This view would be found in the Board's written directives and guidelines and, as well, in the unwritten, corporate conventional wisdom that would have evolved over the years. These directives and guidelines would have been approved either directly or indirectly by the Commissioners, and the corporate conventional wisdom concerning the meaning of the Act would, of course, be part of the received wisdom amongst the Commissioners themselves.

In these circumstances, the Appeals Commissioners' sensitivity to interpretation issues would obviously have been influenced generally by an intrinsic, unconscious presumption of validity. The Appeals Commissioners' major focus was on factual and medical issues and on the determination of the outcomes which the Board's established views of the Act should produce. The compatibility of the established Board view of the Act with the wording of the Act was an issue that was not often on their active agenda.

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[1] This view of the Tribunal's role has to date been generally applied to entitlement questions. Whether some other standard of review should be applied continues to be debated. See section M., V.5 of this report dealing with Substantive Issues — Standard of Review.

The presence in the former appeals system of that unconscious, intrinsic presumption of validity with respect to the Board's view of the Act, and the absence in Ontario in workers' compensation matters of significant court review of interpretation issues, had the practical consequence of allowing the WCB to pursue its own common-sense view of what the Act meant, free, to a large extent, from effective challenge.

That independence was helpful in making practical sense of a complicated subject. That, presumably, is why it was there. It carried with it, however, the seeds and the appearance of arbitrariness, the eventual rejection of which, at a political level, was largely responsible for the adoption of the external appeals system.

The Appeals Tribunal is required by *its* nature to consider specifically in every case whether the decision under appeal complies with the Statute as actually worded. Elimination of the potential for arbitrariness under the old system has been achieved, therefore, at the cost of increased emphasis on statute wording and on the interpretation of such wording — increased emphasis, that is, on law. The creation of the Appeals Tribunal represented, in effect, a deliberate choice in favour of more law and less discretion.

This should come as no surprise, since it is difficult to imagine how a concern about a potential for arbitrariness could be alleviated in any other fashion. What does not seem to be always appreciated is that this choice inevitably involved some increased complexity in the determination of worker and employer rights.

H. THE TRIBUNAL'S RELATIONSHIP WITH THE GOVERNMENT

By decision of Management Board of Cabinet in November, 1985, the Appeals Tribunal has been categorized under section 25-2-1.6 of the Ontario Manual of Administration as a Schedule 1 (anomalous) Agency. The Tribunal Chairman's reporting relationship with the government is through the Minister of Labour.

Section 86b(3) of the Act empowers the Tribunal Chairman to establish job classifications, personnel qualifications and ranges for remuneration and benefits for officers and employees of the Tribunal and to appoint, promote and employ in accordance with such classifications, qualifications and ranges. It also provides, however, that the Chairman is to do all of that subject to guidelines as may be established by the Management Board. The guidelines that have been applied are those contained in the Ontario Government's Manual of Administration.

The Tribunal's costs are not a charge on the Consolidated Revenue Fund but are paid by the WCB Accident Fund subject to budget approval by the Minister of Labour. The Tribunal's financial performance is subject to audit by the Provincial Auditor.

I. THE ADJUDICATION PROCESS

The Tribunal's adjudication process remains, of course, in an active developmental phase. Adjustments continue to be a weekly experience. However, the basic principles to which the Tribunal has been committed from the outset remain constant. These principles are as follows:

1. The adjudication process must not be adversarial in nature.
2. The hearing environment must reflect respect for the seriousness of the undertaking but not be intimidating to workers or employers.
3. The adjudication process must be *effective* from the parties' perspective. That is, it must permit and facilitate the identification and exploration of issues and the effective challenge or clarification of evidence.
4. The decision-makers must not have private information. What the Hearing Panel receives, the parties must receive.
5. The Hearing Panel in a particular case must be excluded in that case from the Tribunal's pre-hearing investigation and preparation process.
6. The adjudication process must be effective from the decision-makers' point of view. It must produce the evidence and understanding a Hearing Panel needs to make a fair and sensible decision.
7. The process must *be* fair and objective. It must also not give the appearance of being otherwise.

The essential operational features of the adjudication process as it stands at the end of September are:

1. Pre-hearing identification of facts and issues by the Tribunal's counsel and parties through the joint development of a Case Description and a selection of relevant documents from the WCB file.
2. Pre-hearing all-party disclosure of evidence and issues to Tribunal counsel.
3. Any necessary pre-hearing Tribunal instructions to Tribunal counsel given through tripartite Case Direction Panels composed of Tribunal members not involved in hearing the case.

4. Hearing dates established through consultation with the parties. Dates so established subject to a no-adjournment policy.
5. Hearings featuring cross-questioning of witnesses; flexible and case-responsive in-hearing procedures; participation in some cases by Tribunal counsel; evidence called where necessary on the Tribunal's initiative; minimal rules of evidence, and active participation where necessary by Hearing Panel chairman and members.
6. In some types of appeals or applications, and with the consent of the parties, decisions without a hearing on the basis of documents only.
7. Careful post-hearing consideration of decisions and reasons by the full Hearing Panel. Reconvening of hearings where panels conclude post-hearing that there is a gap in the evidence.
8. In every case, written reasons explaining fully why the Panel came to its decision.
9. Significant decisions published for general public reference (without identification of worker or employer).
10. Where one of the Panel members dissents, he or she gives written reasons for the dissent and these are issued and published along with the majority reasons.

For an extended justification of various aspects of this process, see the Technical Appendix to the Tribunal's Decision No. 24 attached as *Appendix B* (Yellow).

J. SIX MONTH TURNAROUND GOAL REVISITED

In its Workers' Compensation Board Report dated November, 1985, the Standing Committee on Resources Development indicated that it disagreed with the Appeals Tribunal's goal of completing all but exceptional cases within six months of the commencement of the appeal. The Committee recommended that the planned turnaround time be reduced.

After a number of months experience in processing cases, it is apparent that there are some categories of cases — section 21 and section 77 appeals (employer-requested medical examinations and file access) — where it will be possible to complete cases as a rule within one to two months, and others, such as leave to appeal applications, which it should be possible to deal with typically in two to three months.

But the Tribunal — its Chairman and all full-time members — continue to be satisfied that a planned turnaround time for cases involving entitlement or quantum-of-pension issues cannot typically be dealt with appropriately in less than six months.

Without detailing the specifics of a typical schedule, it is apparent that notice of the appeal to the WCB and to parties, pre-hearing preparation and investigation by the parties and by the Tribunal, disposing of objections to file access for the employer, fair advance notice of a hearing to the parties, post-hearing tripartite consideration of the issues and the settling and writing of sensible reasons, cannot all be accomplished properly in less than six months.

Furthermore, six months should not be seen as inappropriate in cases of that kind. Consider that this is the appellant's last chance after an unsuccessful encounter with the expeditious procedures at the Board; that at this stage the evidence on file is inevitably voluminous and complex; that the cases involve workers' or employers' reputations and Accident Fund liabilities typically valued in the tens of thousands of dollars on an individual basis (and often in excess of $100,000), and that some of these cases will potentially impact on millions of dollars of other similar claims.

With respect to significant cases, the Tribunal is convinced that in the planning of the procedures and process of this Tribunal it would not be appropriate to treat speed of disposition as an overriding consideration.

K. THE ADVISORY GROUP

Since the early planning stages the Tribunal has had the benefit of consultations between the Tribunal Chairman and Alternate Chairman and a group of representatives of worker and employer constituency organizations called the Advisory Group. The Advisory Group came together at the invitation of the Tribunal Chairman and met for the first time in June, 1985. A total of four meetings have been held, and the Group has been consulted by mail on two occasions concerning the development of the Tribunal's Medical Roster.

The Chairman's purpose in organizing the Advisory Group was to provide a forum where information about the planning for the Tribunal could be shared with major players in the various constituencies with a view to keeping the constituencies apprised of the nature of the developing plans and giving them an opportunity to react and advise as the planning progressed.

The forum proved to be very useful from the Tribunal's perspective and the reaction and advice voiced in Group meetings has been influential in respect of many of the choices the Tribunal made as it developed its processes and procedures.

It would be unfair to the members of the Group, however, to suggest that the Group is in any sense responsible for the nature of the Tribunal as it has evolved to date. The Chairman made it clear at the first meeting that he did not propose a decision-making role for the Group and that the Tribunal reserved the right to finally make the decisions that would be required. The Chairman's commitment to the Group was to provide full disclosure and to give careful and open-minded consideration to the views expressed at the Group meetings. And, indeed, it did not always prove possible to respond to the Group's view. The Group will remember — certainly the Chairman will not soon forget — the meetings at which the idea of the Tribunal having its own in-house counsel was roundly rejected by all worker and employer members of the Group — one of the rare instances in the last few years when the worker and employer constituencies had been able to agree on any workers' compensation issue. That meeting provoked a very serious review of the Tribunal counsel idea but in the end the imperatives that emerged in that respect from the perspective of the detailed planning convinced the Chairman and his colleagues that the Tribunal could not in fact be operated without the Tribunal counsel concept. It was implemented with apologies to the Group.

The Group originally consisted of the following organizations and their representatives:

Building and Construction Trades Council—Provincial
Mr. Joseph Duffy,
Business Manager

Canadian Organization of Small Business
Mr. Alec Dixon

Council of Ontario Contractors Association
Mr. Murray Elgie
Mr. Cliff Bulmer

Employers' Council Canadian Manufacturers' Association
Ms. Kathryn Filsinger

Employers' Council on Workers' Compensation
Mr. Les Liversidge

Industrial Accident Victims Group of Ontario
Mr. Brian Cook
Mr. Alec Farquhar

Injured Workers' Consultants
Mr. Nick McCombie

Livingston International Inc.
Mr. Wayne Mahoney

Ministry of Labour
Dr. Alan Wolfson,
Assistant Deputy Minister
Labour Policy & Programs
Mr. Alan Rands,
Office of the Deputy Minister
Mr. Ian Welton,
Policy Branch

Office of the Ombudsman
Ms. Niki Catton

Ontario Federation of Labour
Mr. Cliff Pilkey,
President

Small Business Branch (Advocacy)
Ministry of Industry & Trade
Mr. Jason Mandlowitz

Toronto Building Trades Council
Mr. John Kurchak

Union of Injured Workers
Mr. Philip Biggin
Mr. Harold Giffening
Mr. Constantine Parlanis
Mr. Giuseppe Quatrale

Workers' Compensation Board
Mr. Alan MacDonald,
Vice-Chairman and
General Manager

Many of the individual representatives have, of course, changed over time. And a number of those listed above will be seen now to have different roles in the new structures.

L. THE TRIPARTITE INFLUENCE

Another major difference between the old Appeal Board and the new Appeal Tribunal is the tripartite character of the Tribunal. It is a difference which the Tribunal's public seems sometimes to lose sight of but the tripartite aspect of the Tribunal's design has been of major significance in the Tribunal's development to date.

The Appeals Commissioners at the WCB sat in Panels of three but they were not tripartite Panels. Each commissioner had the same status and took turns chairing the Panels.

The Appeals Tribunal consists of three categories of members:

a) the Chairman and Vice-Chairmen chosen in part for their capacity for objective and non-partisan judgements, one of whom always chairs the Hearing Panel.
b) the members representative of workers, nominated by worker organizations and chosen because of an acknowledged worker constituency background and their appreciation of workers' compensation concerns from the workers' perspective.
c) the members representative of employers, nominated by employer organizations and chosen because of their acknowledged position within the employers' community and their appreciation of workers' compensation concerns from an employers' perspective.

From the beginning it was made clear to all concerned that the Tribunal valued its tripartite character and was intent on taking full advantage of it. The role of the worker and employer members in hearing and deciding cases was defined explicitly to include a recognized role at hearings and Panel-caucuses of keeping one eye on making sure the process was understanding and taking due account of the general issues of special interest to their respective constituencies. The role was also defined, however, to make clear the Tribunal's expectation that at the point of decision, the worker and employer members would each remove his or her partisan hat and apply in good faith his own best judgement as to what was right in the circumstances of each particular case.

It was recognized by all, that if the worker or employer members were to continue to be in fact effective and helpful in the decision-making process, their ultimate conclusions must not be, or be perceived by their colleagues to be, a partisan or politically motivated response.

Members' perception of issues has, of course, been shaped differently as between the worker and employer members — one from experiencing the workplace as a worker and the other from experiencing the workplace as an employer. The open and frank discussion of those different perceptions leads to a more complete Panel-wide understanding of the issues and their implications and thus to a better decision.

The tripartite environment that has developed within the Tribunal has proven positive and constructive. Panel caucuses involve full discussion and careful, open-minded consideration of all views. Often several drafts of a decision will be needed before the discussion has run its course. There is, within the Tribunal, general satisfaction with the effectiveness of the tripartite design in the decision-making process.

Some evidence of that effectiveness may be seen in the fact that in the 251 decisions issued during the reporting period there were only four dissents.

Given the personal qualities and senior career experience of particularly the full-time employer and worker members, the absence of significant numbers of dissents provides some significant evidence of the Tribunal's general objectivity.

It should also be noted that the tripartite influence is not confined to the decisions in individual cases. Through the weekly general Tribunal meetings and through the daily contacts of the close working relationships that have grown up across partisan lines, the tripartite influence is pervasive at all levels of the Tribunal's activities.

M. THE TRIBUNAL'S PERFORMANCE

I. INTRODUCTION

The Appeals Tribunal has been a judicial entity for twelve months, but an operational Tribunal in any meaningful sense only for nine. The reporting period has been one of organization; of process and systems design and deployment; of finding and equipping premises, and of recruiting and training members and staff. It has been a time of discovery concerning the nature of the issues — medical, legal and human — which the Tribunal confronts. The period has been characterized by steady progress punctuated by occasional setbacks and highlighted by moments of surprising achievement. High personal commitment of Tribunal members and staff has been its hallmark.

At the time of reporting, we have arrived at a point where the Tribunal is substantially in place, organized and equipped to provide effective and fair hearings and to deliver well-reasoned decisions, all at a rate sufficient for

the caseload that may be expected. We have only begun to reduce the backlog of cases that resulted from the transition from the Appeal Board to the Appeals Tribunal, but have managed to prevent the backlog from increasing. It is expected that the backlog will be disposed of by the end of the calendar year, 1987.

What follows is a summary of some of the particular highlights of the Tribunal's performance during the twelve months since its creation was proclaimed on October 1, 1985.

II. ADMINISTRATIVE HIGHLIGHTS

1. Order-in-Council Appointments

One of the most important aspects of the Appeals Tribunal is, of course, its roster of Vice-Chairman, Employer Member and Worker Member appointments. The Tribunal and the Government conducted searches and the Chairman or Alternate Chairman interviewed over 100 candidates for full-time and part-time appointments. As may be seen from the previous section on Tribunal Members, the Lieutenant Governor in Council has appointed an outstanding group of individuals in all three categories, both full-time and part-time. To date, there have been a total of 19 full-time and 37 part-time appointments.

2. Staffing

As of the end of the reporting period, the Tribunal's administrative staff complement of permanent employees is 76.

The classification, recruitment, training and deployment of this number of staff was accomplished in the midst of developing from scratch the Tribunal's administrative processes and systems to service an operational process which, itself, was in a state of design and development and constant change. It was also carried on while the physical facilities and equipment were being assembled and organized and while large numbers of files were being actively processed. It was an achievement, in the Tribunal's own view, of not inconsiderable dimension.

The achievement is particularly impressive when one considers the quality of the staff that was assembled. The Tribunal is committed to an institutional environment which is respectful of workers and employers and their rights, and which presents a receptive and friendly face. It is apparent from the informal feedback we have received to date that that particular goal has been largely met. The extra personal commitment of staff through this start-up period in every area of the organization has made it possible for the organization to rise to the many challenges. That commitment also speaks strongly to the success of the staffing enterprise.

3. Premises

The Tribunal began work in October, 1985, in temporary space made available by the WCB at 920 Yonge Street, Toronto. In June, 1986, it moved to permanent quarters at 505 University Avenue, Toronto. These quarters are centrally located a short block north of the Dundas/University subway station, close to bus and train stations. They are, of course, wheelchair accessible.

The public areas are located on the seventh floor and include six hearing rooms of varying sizes and a comfortable reception area. Witness rooms are available to parties for private consultation while waiting for hearings to proceed. The seventh floor also houses the Tribunal's workers' compensation library which is open for use by the public.

4. Computer Systems

The Tribunal is committed in its administration to the effective use of computer technology. It considers computers to be of particular importance to the efficient processing, scheduling and control of its caseload.

The Tribunal's first initiative in this area proved unsuccessful. A computer system based on a centrally operated mini-computer design, was procured, purchased and installed. After a period of about four months of intensive efforts it proved impossible to achieve acceptable operation and the supplier suggested that it withdraw its equipment. The cost to the Tribunal in terms of wasted administrative resources and disruption was serious, but the situation was retrieved without litigation and without disbursement of any part of the agreed purchase price. In retrospect it is apparent that the Chairman's push to have the Tribunal fully operational on an urgent basis was a major factor in this failure.

A replacement system is being developed in conjunction with the Ministry of Labour and Ministry of Government Services. In the meantime, resort has been had to rented, stand-alone microcomputers and the *ad hoc* development of essential individual programs.

5. Payroll Administration

It has proven possible to work out an arrangement whereby the technical administration of the Tribunal payroll is delegated to the Ministry of Government Services (IPPEBS system). This was not a simple matter from a technical point of view. It was complicated by the fact that the source of the Tribunal's payroll funds (as well as other funds) is not the Consolidated Revenue Fund but the WCB Accident Fund, and particularly by the original statutory provision which made Tribunal staff, members of the WCB Superannuation Fund. This latter feature has disappeared with the recent statute amendment making Tribunal staff eligible for the Government of Ontario pension plan.

6. Assistance from the Ministry of Labour and the Ministry of Government Services

The Tribunal has been able to turn to the experienced resources of the Ministry of Labour and the Ministry of Government Services for advice and assistance in a number of areas, most notably: the tendering and contract process in the acquisition of the permanent premises and of major components of furniture and equipment; the layout, design, and construction of permanent space renovations; the specification of the computer systems; budget advice; job classification advice; printing services, and advice concerning government processes generally.

7. The Research and Publications Department

The work of this Department during the reporting period is of particular interest.

a) *The Tribunal Library*

The Tribunal library, part of the Research and Publications Department, is staffed by a librarian and two library technicians, one of whom is bilingual in English and French. The library and most of its services are open to the public from 9 a.m. to 5 p.m., Monday to Friday.

The Library's goals include:

- accessibility to users with various degrees of knowledge about workers' compensation
- service as a "library of record" on workers' compensation issues (bringing together under one roof published and unpublished material which was, up to now, scattered across a variety of medical, legal, and government collections)
- an acquisitions policy which reflects the information required in advocating and adjudicating workers' compensation cases.

In the first months of operation, the major achievements of the library have been to set up a basic collection and to maintain continuous service under difficult physical conditions at the Tribunal's temporary premises and during the move to 505 University Avenue.

The library has developed its collection of 1,200 books, reference works and government documents as well as 75 journal titles in major areas such as compensation law and policy, government, medicine, specific diseases, current technology and occupational health and safety, and labour force issues.

A particularly successful project has been the library's computer index system for medical and legal journal articles, especially those related to industrial disease and disablement in the context of work activities. By the end of August, some 1,000 items will have been indexed or can be retrieved under headings of current interest such as "chronic pain" or "repetitive motion". To make computer searches easier, a subject heading thesaurus is being prepared to allow cross-referencing of terms. Computer access has also been developed and maintained for indexed Tribunal decisions.

The library has avoided duplication of facilities by arranging access to inter-library loan and computer search systems and to material in microfiche catalogue material. Internal services provided to Tribunal staff and members include detailed data base searches, distribution of acquisition lists, and a current awareness service.

Ongoing special projects include the collection of statutory material, legislative debates and government reports on workers' compensation since its introduction to Ontario more than 70 years ago.

b) *Publications*

Prior to the existence of the Tribunal, decisions of the WCB Appeal Board were neither published nor distributed. Essentially, a decision was only available to the worker and employer involved in a given case. The lack of access to decisions meant that workers, employers, and their associations and representatives were often unable to discover the principles which would be applied to a given case. Representatives and

organizations less frequently involved in compensation appeals or in smaller Ontario centres were particularly disadvantaged by the inability to research an issue by reviewing past decisions. And the principle of relative fairness — that like cases should receive like treatment — could not be addressed.

Also, the removal of the final appeal step from within the WCB organization created the need for a method of routine communication between the Appeals Tribunal and the Board as to the reasons for the Tribunal's decisions. If the system is to work as an integrated whole, the Board's primary decision-making process must be responsive to the Tribunal's day-to-day decisions. Because of the principle of the independence of the Tribunal from the Board, these communications must be public. Published written reasons are, therefore, the indispensable means of maintaining the essential Tribunal-Board nexus.

For all of the above reasons the Appeals Tribunal is publishing and indexing its decisions.

The Tribunal provided widespread free public distribution of full-text copies of all of the Tribunal's decisions issued to the end of June, 1986. This was thought necessary because of the obvious significance of each one of the decisions during the initial period of the Tribunal's work and of the particularly pressing interest of the various constituencies in the first few months as to what the new Tribunal was doing.

As of the end of June, the policy for providing ready public access to Tribunal decisions focussed on "selected" decisions and now encompasses the following set of publications:

Annotated Statute Index
Decision Digest
Keyword Index
Numerical Index
Workers' Compensation Appeals Tribunal Reporter

All of these are now available, with the exception of the *Workers' Compensation Appeals Tribunal Reporter*. The first volume of the Reporter is due to be published in December.

As of July 1, 1986, individuals or organizations with a particular interest have been able to purchase an annual subscription for a full publication service at a price of $60. This includes all of the above publications, plus monthly receipt of full-text copies of all significant Tribunal decisions. The Decision Digest, Annotated Statute Index, Keyword Index and Numerical Index are available free and are mailed out as they become available to anyone who has indicated an ongoing interest.

Free copies of all publications are made available to members of the Legislature who request them, to libraries, and to other WCB organizations, etc. The WCB itself, of course, receives copies of *all* decisions.

The Tribunal is experimenting with another type of publication designed as a forum for discussion and debate of workers' compensation matters. It is to be called the *Compensation Appeals Forum*, and the first issue is scheduled for publication in October, 1986. It will contain articles or comments from people external to the Tribunal offering considered criticism of the Tribunal's decisions. It is hoped that these criticisms will prompt responses from the Tribunal's public in future issues, and that the ensuing debate will assist in the long-term development in contentious areas of a good understanding of both the strengths and weaknesses of the *Workers' Compensation Act*, and also in constructive development of the Tribunal's views on particular issues. The idea of the Forum is a response to the frustration that various constituencies expressed in not having adequate opportunities to make submissions in respect of fundamental issues being dealt with in individual cases.

c) *Research*

The Research and Publications Department also provides the Tribunal with in-house research services in both the medical and legal areas and there has been a high level of research activity through the reporting period. Where research product is used by Tribunal counsel in presentations to Hearing Panels in particular cases, it is, of course, also made available to the parties. Post-hearing research may be initiated by a Hearing Panel puzzled over some aspect of a case. Where that research turns up material that raises a crucial issue not on the agenda during the hearing, the parties will be advised and given a further opportunity to make submissions.

d) *Provincial Outreach*

The Appeals Tribunal has attempted to communicate an understanding of its nature and role in the community at large. This attempt has been made through its Outreach Programme, its publications and the person-to-person contacts of its Chairman, Alternate Chairman, Vice-Chairmen, Members and staff at less formal activities such as conferences and meetings.

From December, 1985, to March, 1986, the Appeals Tribunal's Chairman and Alternate Chairman participated in Tribunal-organized Outreach Programmes in London, Sudbury, Thunder Bay, Hamilton, Windsor, Sault Ste. Marie, Ottawa and Timmins. Well over 2,000 people attended these sessions. The Appeals Tribunal has published a pamphlet entitled "How to Appeal to the Workers' Compensation Appeals Tribunal". By the end of July, 1986, eighteen thousand copies of the pamphlet had been distributed to individuals and organizations across the province. Information about the Tribunal and its procedures has also been distributed through its publications, which include a *Newsletter*, distributed to over 1,300 individuals and organizations, and *Practice Directions* as they become available.

8. The Tribunal Counsel Office

a) *The Role Generally*

One aspect of the Tribunal's adjudication process which proved particularly contentious was the concept of the Tribunal utilizing its own in-house counsel. The Tribunal has had occasion to describe the role of the Tribunal's counsel in its *Decision No. 24* and to justify that concept in the Technical Appendix to that decision. The Technical Appendix appears as *Appendix B* (Yellow) to this Report, and the justification for the counsel's role may be seen there. The description as extracted from the body of Decision No. 24 reads as follows:

> The role of . . . Tribunal counsel . . . may be described briefly as follows. They take the WCB file and cull from it what they consider to be the relevant documents. They then prepare a draft "Case Description", setting out the background and undisputed facts and identifying the factual issues and any legal issues. They provide to the parties to the appeal copies of the Case Description and of the documents from the WCB file which they believe should be filed with the Hearing Panel.
>
> The parties to the appeal are invited to advise counsel if there is anything in the Case Description which they think needs to be amended or deleted or if there are any omissions. Any changes that the parties require are then made or disagreements noted. When the Case Description and the list of documents have been settled copies of the Description and documents are then provided to the Hearing Panel.
>
> In the preparation of the Case Description and the selection of relevant documents, etc., Tribunal counsel have no contact with members of the Hearing Panel. They act under general instructions from the Tribunal and where they feel it necessary to get specific instructions concerning any aspect of a particular case they will appear before a separate Panel of the Tribunal called a Case Direction Panel — a tripartite Panel like the Hearing Panel — which will provide them with those instructions. If contentious issues arise during the preparation of a Case Description which cannot be resolved by discussion between the Counsel and the parties, the parties may make representations to the Case Direction Panel and the matter may be resolved at that level.
>
> Ultimately, any unresolvable issues about the relevancy of any document or the identification or definition of issues, etc., will be left to be dealt with by the Hearing Panel at the first hearing.
>
> The Tribunal's instructions to the Tribunal Counsel Office and to the members of the Tribunal concerning contact in any case between the Tribunal's counsel and any member of the Hearing Panel prior to the hearing are explicit. With the exception of the documents delivered to the Hearing Panel in preparation for the hearing — copies of which are also provided to the parties — the Hearing Panel members are to have no prior communication with the Tribunal counsel about any case on which they sit as a member of the Hearing Panel. Any such prior contact disqualifies them from sitting as a member of the Hearing Panel.

b) *The In-Hearing Role*

The role of the Tribunal Counsel at the actual hearing of the case has been defined in internal Tribunal documents in the following terms:

> At the hearing of a case, a Tribunal Counsel Office member shall act as counsel to the Tribunal. His or her instructions in that role are to assist the Tribunal from a non-adversarial or partisan perspective in the conduct of hearings and in the clarification and probing of evidence; to present any evidence to be called on the initiative of the Tribunal; to help with the elucidation of the issues and evidence, and to defend the Tribunal's process; all as may be necessary or desirable for an expeditious, fair and effective hearing.

Until the end of March, 1986, Tribunal counsel attended all hearings in their entirety. Since March, Tribunal counsel have continued to appear at the commencement of all hearings to address the Panel concerning the issues involved in the case, but in only a percentage of selected cases (20%) are they participating throughout the hearing.

c) *Major Tribunal Litigation*

The Tribunal Counsel Office is supervised by the Tribunal's General Counsel, whose responsibilities include advising and acting for the Tribunal in any litigation in which it may become involved. To date, the major litigation involving the Tribunal is as follows:

1) Application for Judicial Review in which the applicant is alleging bias in the Hearing Panel for having on the eve of the hearing read submissions of Tribunal Counsel on the legal background to the case where the parties did not receive their copies of the submissions in time to file responses prior to the hearing.

2) Application for Judicial Review in which the applicant is alleging that the Hearing Panel's refusal to grant an adjournment during the course of the hearing to enable further evidence to be called constituted a denial of natural justice.

The General Counsel has also proven to be a major point of contact between the Tribunal and the community of professional workers' compensation advocates and lawyers.

9. Intake and Scheduling

a) *Intake*

Intake is the point in the Tribunal's process administration at which incoming appeals and applications are received, their category identified and the various appropriate procedures initiated. It is, as might be expected, a point of critical importance to the processing performance of the entire Tribunal. It is at this point that cases are set on the procedural rails appropriate to their nature; where special problems must receive early recognition, and it is here in the contact with the Intake staff that the workers and employers receive their all-important first impression of the Tribunal's institutional character.

The Intake procedures have been the subject of continuous development and adjustment throughout the reporting period and it is expected that the process will continue for some time.

b) *Scheduling*

The scheduling process whereby each month over 200 prepared cases are matched with the availability of each party, of each party's representative, of the Tribunal Counsel and of the three members (full-time or part-time) of an appropriate Hearing Panel, and with the availability of hearing rooms, presents problems common to any court or adjudicative tribunal. It is, also, however, a process that must reflect the special characteristics of the Appeals Tribunal's process and the special needs of its clientele. The development in this area of policies and procedures which are both efficient and appropriate to the Tribunal's work has proven to be particularly difficult and the subject of some contention, particularly between the Tribunal and the representatives of parties appearing before the Tribunal.

Most difficult has been the development of an acceptable policy concerning the establishment and adjournment of hearing dates. The Tribunal started out by selecting dates arbitrarily and, where the representatives or parties were given at least six weeks notice of that date, refusing requests for adjournments except in very unusual circumstances, which did not include the convenience or conflicting schedules of representatives.

The strong negative reaction to this policy from both workers' and employers' representatives, ultimately led to the adoption of a policy of arriving at a mutually acceptable date by consultation between the Tribunal and at least the appellant's or applicant's representative. This change represented, of course, a significant additional administrative burden in the scheduling process, but experience has satisfied us that the previous policy was not practicable. The adjournment policy remains, however, the same.

10. Maintaining Uniform Standards and Consistency in Tribunal Decisions

Up to the end of August, the Tribunal had issued 218 decisions involving a total of nine different Vice-Chairmen and 24 different worker and employer members, both full-time and part-time. Starting in September,

the Tribunal moved into a period when it will be utilizing some 57 part-time or full-time individual adjudicators (vice-chairmen and members) with an eventual target of 215 decisions a month.

The Tribunal's mandate includes the publishing of fully reasoned decisions. For this body of decisions to be useful in contributing to the goals of ensuring that cases decided in the future will receive like treatment to similar cases decided in the past, and in influencing the future decisions of the WCB, the decisions issued by the Tribunal must not only be sensible in their own individual context but must ultimately also make sense when compared one to the other. It is also necessary that Tribunal decisions be uniform in format and that they meet a uniform minimum standard of quality of writing and reasoning. It is also important that there develop a consistent Tribunal approach to such things as the kind of evidence that will be received and the nature of the evidence required to justify various kinds of decisions.

The large number of cases, the large number of individuals necessarily involved in the conduct of the hearings and the writing of the decisions, and the fact that on every issue the Tribunal is starting from scratch, make the accomplishment of these goals inherently difficult.

To deal with the difficulty the Tribunal has adopted a number of strategies:

1. The Tribunal has been actively engaged from its inception in a general Tribunal educational process involving, amongst other things, the identification and discussion at weekly Tribunal meetings of significant issues that may be expected to arise. The purpose of these discussions has not been to arrive at any conclusion on such issues but to develop throughout the Tribunal an awareness of the existence of such issues and an appreciation of their dimension and quality.
2. The role of Tribunal counsel in working with the parties to identify relevant issues prior to the hearing and, in difficult cases, assisting at hearings with the elucidation of issues, ensure that Hearing Panels will be aware of issues likely to be of interest from an overall Tribunal perspective. (The Hearing Panel is, of course, ultimately responsible for determining the issue agenda in any particular case.) The Tribunal counsel's role will also ensure that Hearing Panels (and the parties) will be aware of any particularly relevant, prior Tribunal decisions.
3. The Tribunal attempts through its scheduling processes to ensure that Hearing Panels have at least one full-time member.
4. Training programs are provided to new Tribunal members.
5. At the decision-writing stage, the Chairman has established a procedure where decisions are reviewed by the Chairman's Office in draft form — occasionally by the Chairman himself more often by the Counsel to the Chairman — with a view to bringing to the attention of the Vice-Chairman and Panel any aspects of the draft which present a concern from the point of view of the Tribunal's interest in consistent standards, non-conflicting decisions, etc. It is appreciated that this is a sensitive strategy from an administrative law point of view. The Chairman's Office is careful not to intervene in any manner with respect to any substantive issue of fact or medical fact, and it is made very clear to all concerned, that it is the Hearing Panel that has the final decision on any issue of interpretation as well. The Chairman had occasion, early in the process, to write a memorandum to a Vice-Chairman explaining the nature of the review and its purpose. A copy of that memorandum, amended to ensure the anonymity of the parties may be found in *Appendix C* (blue). It will serve to illustrate the nature of this review process.

   It is important in this respect to keep the distinction between the Counsel to the Chairman and the Tribunal's Counsel clear. The Counsel to the Chairman is not involved in the work of the Tribunal Counsel Office — she does not participate in either pre-hearing preparation or the hearing itself. The Tribunal is committed to the principle that a Tribunal counsel who works on the case or appears on behalf of the Tribunal at the hearing, must not have any post-hearing contact with the Hearing Panel except through an exchange of correspondence with copies to the parties. (The need for such latter exchange will arise in cases where the Hearing Panel finds that it needs further evidence or more submissions, etc.)

11. Out-of-Toronto Hearings

Beginning in February, 1986, the Tribunal has been sending Hearing Panels to Timmins, Sudbury, Thunder Bay, Windsor, London and Ottawa. So far, a total of 68 hearings have been held out of Toronto.

The policy that has evolved is one of collecting prepared cases for each out-of-Toronto location and then sending a Hearing Panel to that community for several days to hear a number of cases.

12. Training

In addition to the usual training required and expected in connection with the deployment of new administrative staff, the Tribunal has been concerned to ensure that the Lieutenant-Governor-in-Council appointments — Vice-Chairmen and Members, both full-time and part-time — receive orientation and training

before sitting on cases. This training has involved the preparation and distribution of collections of written materials describing the Tribunal's process and identifying typical issues, etc., formal training sessions of one or two days' duration, and pre-assignment observation of actual hearings by incoming members.

A two-day training session held early in October 1985, also involved Tribunal counsel and representatives from the worker and employer advisers' offices, clinics, consultants and lawyers. This two-day session was focussed on a series of mock hearings and was intended to be both a training session and an exploration of how a tentatively designed adjudication process might work in actual practice. Much was learned from this session and the process was adjusted significantly as a result. Another two-day training session was held in December to deal with the December appointments and a one-day training session was held in July, following the May appointments.

The Tribunal has also adopted the policy of having one full-time member on every Hearing Panel.

13. Medical Roster

The *Workers' Compensation Act* provides for the creation of a roster of medical practitioners, appointed by the Lieutenant Governor in Council, to assist the Appeals Tribunal in cases where the issue under appeal involves a decision of the Board on a medical report or opinion. These practitioners are referred to by the Tribunal as Medical Assessors. The Tribunal found, however, that there was also a need for the Tribunal and Tribunal counsel to have a small group of Tribunal-appointed medical counsellors who could advise in connection with general medical issues, and assist, as well, in the development of the approved roster of medical assessors. A number of senior members of the medical profession have agreed to serve under contract as part-time Appeals Tribunal Medical Counsellors.

Dr. Brian Holmes, former Dean of the University of Toronto Medical School and former Radiologist-in-Chief, Toronto General Hospital, has played a leading role in assisting the Chairman in enlisting the participation of these senior counsellors.

The participation of these medical counsellors in respect of individual cases is confined to pre-hearing consultation. They are not authorized to examine workers or give evidence, nor do they communicate at any time with the members of the Hearing Panel.

The process of developing a list of the medical assessors who will be authorized to examine workers and give reports to Hearing Panels has been a prolonged one. A list of 21 physicians with a variety of different specialties is currently in the process of being considered by the Ministry of Labour for appointment by the Lieutenant Governor in Council.

A copy of the Tribunal's policy in respect of the employment of medical assessors is attached as *Appendix D* (Orange).

The Appeals Tribunal has also employed a full-time medical liaison officer to co-ordinate its relationship with the medical community and administer the Tribunal's employment of medical counsellors and assessors.

14. Practice and Procedures

The Appeals Tribunal is entitled by statute to establish its own practice and procedure and, of course, the development of appropriate practices and procedures has been a major Tribunal concern since its inception.

Different procedures have evolved for the various matters which are brought to the Tribunal. Those appeals which involve entitlement to compensation or the quantum or duration of benefits are referred directly to the Tribunal Counsel Office for preparation of the Case Description. This document which has been referred to previously is prepared from the contents of the claim file received from the Workers' Compensation Board. It identifies the issues involved in the appeal and provides a history of the claim and how it was treated by the Board. It also provides references to the relevant sections of the legislation, Board policies, and to relevant prior Tribunal decisions. The Case Description with copies of relevant file documents attached is distributed to the parties and the Hearing Panel prior to the hearing and provides the focus for the hearing itself.

Applications dealing with employer access to worker files are determined by a Hearing Panel after receiving the written submissions of the parties.

Applications concerning workers' objections to attending a medical examination by a doctor of the employer's choice are mediated by the Tribunal in an attempt to settle the matter without a hearing. If a settlement cannot be reached, the application is referred to a Hearing Panel.

Applications for leave to appeal from a decision of the Appeal Board of the WCB are considered on the basis of written submissions, or at an oral hearing at the request of the parties. If leave to appeal is granted, a Case Description is prepared by the Tribunal Counsel Office and the appeal is rescheduled for hearing.

A series of Practice Directions have been developed outlining these procedures and these are available from the Appeals Tribunal upon request.

III. CASELOAD PERFORMANCE

In analyzing the so-called backlog of any administrative tribunal, it is necessary to distinguish between the *backlog* and the *workload*. The workload is the work progressing as planned. The backlog is the work not progressing as planned. The *caseload* is the workload plus the backlog.

It is the backlog which represents a tribunal's failure to reach or maintain its production plan.

The Appeals Tribunal's *steady-state* workload goal is to dispose of 150 appeals or applications per month. This is what it now estimates will be required to keep even once the backlog has been disposed of. The Tribunal's plan is to bring all but exceptional cases to a hearing within four months, and to render decisions in such cases within two months. That plan represents a normal workload at any one time of *600* cases in the pre-hearing stage and *300* cases in the post-hearing stage.

As of the end of September the caseload in the pre-hearing stage totalled *1,501* cases and in the post-hearing stage about *310*. Thus, judged against the steady-state plan, the backlog at the end of the reporting period is in the order of *900* files.

This is not to say that there are 900 files sitting waiting to be reached. The actual number of files simply waiting for the Tribunal to commence processing them was reduced, as of the date of this report, to about one week's input (30 files). The backlog is to be found in slippage against the ultimate production plan at various stages in the process. This includes *260* pension assessment appeals which are being deliberately held pending a decision in the pension leading case.

The picture may also be assessed from the production side. As of the end of September, the number of appeals or applications received by the Tribunal since its inception on October 1, 1985, totals *2,550*. We have held hearings in 650 cases, in 450 of which the hearings have been completed. Final decisions have been issued in 251 cases.

There are, as well, 400 cases which were disposed of without a hearing. These include cases withdrawn, cases where the Tribunal's lack of jurisdiction could be determined without a hearing as well as some cases involving worker objection to employer-arranged medical examinations under section 21 which were settled as a result of Tribunal mediation efforts.

Thus, of the 2,550 cases received, 650 have been dealt with finally — either with or without a hearing — and 310 are awaiting decision after completed hearings. In another 400 cases, the preparation is complete and hearings are or will be scheduled in October and November. The balance are located at various stages of the pre-hearing preparation process.

The Tribunal's plan for overcoming the current backlog of 900 cases is to bring the number of hearings per month up to 215 as of November, 1986, and to hold it there until the backlog is beaten. If the average incoming rate continues at the rate at which it appears to have levelled off — i.e., at about 150 per month — that plan will see the backlog disposed of by the end of 1987. The turnaround time for significant cases will be under seven months by July, 1987.

The reasons for the backlog of cases are numerous and, of course, given that this is a report on the first twelve months of the Tribunal's legal existence (and on the first nine months of any effective operational existence) none of them are very surprising. Predominant is the backlog of 1,100 cases that existed on the Tribunal's first day of existence.[1]

It is clear also, however, that the Tribunal's success in not allowing the backlog to increase beyond the October, 1985, level is attributable in important measure to a lower intake rate overall than we had originally anticipated. For example we had planned to receive about 1,000 applications for leave to appeal over the first 18 months — a rate of about 55 per month. Over our first year leave applications have come in at 34 per month (for a total of 400). We had also anticipated a somewhat higher number of appeals from current Hearings Officer decisions.

IV. PENSION APPEALS LEADING CASE STRATEGY

The Tribunal's strategy of utilizing the hearing of a single appeal as a vehicle for an intensive exploration of the special issues and problems faced by the Tribunal in dealing with pension appeals has been the focus of some public attention. The nature of that strategy and the reasons for it were explained at length in the Tribunal's Practice Direction No. 1, dated December, 1985.

Final arguments in the *leading* case will be delivered the week of October 13. (The evidence was completed the week of September 20.) The decisions will be written as quickly as possible but cannot now realistically be expected before January.

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[1] The 617 cases actually backed up in the Appeal Board pipeline as of October 1, 1985, and another 496 cases subsequently received involving appeals of WCB Appeals Adjudicator decisions issued before September 1, 1985.

The leading case strategy has delayed 260 individual cases. It has, however, had minimal impact on the Tribunal's total production figures. The cases delayed pending decision in the leading case, were replaced in the Tribunal's production schedule by other kinds of cases which would otherwise not have been reached.

Tying up five full-time Tribunal members for three weeks of extra hearings in September and another week in October will reduce our September/October production figures by 30 to 40 hearings.

The June/July hearings had little impact on overall production because the delay in the appointment of additional part-time vice-chairmen had left full-time side members underemployed during that period.

The hearings held to date have confirmed to the Tribunal's satisfaction that approaching the pension issues in this manner was essential. The education the hearings have provided concerning the nature of the issues in pension assessment appeals has been eye-opening for all concerned. To have treated these cases like others and decided a number last winter on the basis of routine three-hour hearings or the like, would have resulted in decisions that would almost certainly have been wrong or even foolish.

As a result of these extended hearings, knowledge of the Board's policies, practices and procedures in pension assessments has expanded tremendously, as has the understanding of some of the medical issues. The appreciation of the nature of some of the major issues is, as a result, significantly different now than it was.

The hearings have taken much longer than originally planned, but this reflects the limitations in the earlier perception of the problems. The hearings have been packed full of new information and insights and they have progressed as quickly as the nature of the project would permit.

In the Tribunal's view, the strategy has been vindicated. The decision in the case remains, however, as portentous and difficult as ever.

V. SUBSTANTIVE ISSUES

1. Introduction

In the decisions it has made and issued to the end of September, and in the cases in which decisions are in preparation, the Tribunal's Hearing Panels have confronted a large number of difficult issues of first impression concerning the interpretation and application of the *Workers' Compensation Act*. Brief descriptions of the most significant of such issues are presented here for the purpose both of bringing them to the attention of the reader and also of indicating generally the level of intellectual activity that has characterized the Tribunal's work environment during the first twelve months of its life. One of the major surprises for the Chairman and Tribunal members in moving from the stage of speculating about the Tribunal's role to experiencing its reality has been the number and the difficulty of the substantive issues which reality presented.

2. What is an "Appeal" and What is the Nature of Tribunal's Adjudicative Role

At the outset, there was the initial question about what the word "appeal" was intended to mean as it was used by the Act in describing the Tribunal's jurisdiction. This question was resolved in the manner described in the earlier section on the Tribunal's jurisdiction. Coupled with that question, and fundamental to the nature of the adjudication process, was the issue as to the extent to which the Act contemplated an investigative interventionist role for the Tribunal as contrasted with the aloof, purely adjudicative role of a traditional adjudicator. The Tribunal's conclusions on that issue in favour of the interventionist role may be seen in the explanation of the adjudication process set out in the Technical Appendix to Decision No. 24 attached as *Appendix B* (Yellow).

3. Setting the Issue Agenda — The Tribunal's Powers

Acceptance of the interventionist investigative role carried with it, in the Tribunal's view, the necessity for the Tribunal to have the final say as to the agenda of issues to be addressed in any particular case. That view of the Tribunal's powers has proven to be a particularly contentious issue, with many parties resisting the proposition. The nature of the debate and the Tribunal's current position on this question may be seen in the Interim Report issued in the pension assessment leading case, the relevant extract from which is attached as *Appendix E* (Grey).

4. Finding Limits to the Requirement that the Board Have Exhausted its Procedures

The issue-setting question was also tied in with the problem of knowing how to apply the limitation on the Tribunal's jurisdiction set out in section 86g of the Act. As outlined in the earlier section on The Tribunal's jurisdiction, that section of the Act prohibits the Tribunal from deciding issues in respect of which the Board's procedures have not been exhausted. However, interpreted strictly, that section creates a ping-pong effect with workers or employers being sent back to the Compensation Board, back to the Tribunal, back to the

Compensation Board, back to the Tribunal, etc., to no practical purpose. The reading of the section which currently prevails and which was designed to ensure that the Board's experience and expertise were not excluded when there was a significant role for them to play, but that the settlement of workers' or employers' rights were also not delayed unnecessarily, may also be seen in the extract from the interim decision in the leading case strategy set out in *Appendix E* (Grey).

5. Standard of Review

Another threshold issue which the Tribunal's Hearing Panels continue to explore is the standard of review the Tribunal should be applying when it hears appeals from Board decisions of various kinds. Should it be enough, for example, that the Tribunal conclude that the Board's decision was not unreasonable or not obviously wrong or should the Tribunal be concerned simply to ensure that the Board did not take into consideration inappropriate factors? In what circumstances, if at all, did the Act intend the Board to have the so-called "right to be wrong"? What differences in this respect does it make depending on whether the Board was exercising powers expressed in the Act in discretionary terms? Is the proper question for a Hearing Panel of the Tribunal, what *it* would have done in the Board's shoes?

The position on this subject continues to develop as Hearing Panels encounter various categories of Board decisions, but at the moment the Panels are tending to interpret instructions and the powers given to the Tribunal by the Act — instructions and powers which are virtually identical to those given by the Act to the Board itself — as reflecting the intent that Tribunal panels review each of the Board's decisions on the basis of asking themselves the question, "Is this decision *right* in our view?" Certainly, this is the position that has prevailed so far with respect to questions of entitlement.

6. Employer Access to WCB Files in the Tribunal's Possession

An issue that arose immediately when the Tribunal reached the stage of starting to process actual cases was the question of employer access to the worker's WCB file in the Tribunal's possession.

Section 77 of the Act deals at length with the worker's general right to object to an employer having access to the WCB file and with the procedures whereby the Board would decide whether or not access would be granted. By provision in section 77, the Board's decisions in that respect may be appealed to the Appeals Tribunal and the appeals to the Tribunal under that section eventually presented their own particular issues.

At the outset, however, what concerned the Tribunal particularly was how to deal with the question of access to WCB files at the point in time when the file had been transferred from the WCB to the Tribunal following an employer's or worker's appeal of a substantive decision.

If section 77 meant that requests for access to the worker's file for purposes of the Tribunal's proceedings had to be dealt with by referral back to the Board under the terms of section 77, the potential for significant additional delay in the Tribunal's proceedings, for the Tribunal's loss of control over its own proceedings and for the creation of confusion in the minds of workers and employers as to the independent status of the Appeals Tribunal were all serious.

The Tribunal ultimately concluded that section 77 was not intended to apply to access to the file when it had been transferred to the Tribunal's control. It became necessary, then, for the Tribunal to develop its own criteria for granting access consistent with the policy implicit in the section 77 provisions. See Tribunal Practice Note No. 1 for a description of those criteria.

7. Section 21 Applications

Section 21 of the Act deals with the obligation of an employee to submit to a medical examination by a medical practitioner selected by an employer. If the worker objects to such an examination, the section specifies that the objection may be submitted to the Appeals Tribunal for determination. Here, again, the section fails to specify the circumstances in which a worker's objection to attending an employer's medical examination ought to be upheld. It is apparent from the context, however, that the Legislature contemplated *some* grounds that would justify upholding the worker's objection. It was therefore necessary to develop criteria which would apply in determining whether or not the employer's right to have the worker submit to a medical examination would be enforced. See Decision Nos. 174 and 306.

8. Leaves to Appeal Under Section 86o — Criteria Defined

Section 86o extends to anyone with a final decision from the Appeal Board level of the WCB prior to October 1, 1985, the right to apply to the Appeals Tribunal for leave to appeal. It sets out two general conditions either of which must be met for the application to be granted. The development of criteria for determining whether the

stated conditions could be said to have been met in particular cases was the subject of long Hearing Panel discussions and only in the last month or so of the reporting period did those criteria begin to emerge in a concrete form. See Decision Nos. 131 and 64.

9. Section 15 Applications — A Major Problem

With the creation of the Appeals Tribunal, the power under section 15 of the Act to decide whether or not a worker is prohibited by the *Workers' Compensation Act* from pursuing an action for personal injuries in the civil courts of the province was assigned directly to the Tribunal. It had previously been the responsibility of the Workers' Compensation Board's Appeal Board. Sections 8 and 9 of the Act are the operative sections which specify under what circumstances the right of action is taken away. Section 15 is the procedural section providing for application to the Tribunal for decision.

In broad terms, the civil right of action is taken away if Part 1 of the Act would provide workers' compensation benefits, given the circumstances under which the worker's injuries arose. The Act presents numerous serious problems of interpretation in this area but most difficult for the Tribunal — and, in the Chairman's view, for the integrity of the compensation system contemplated by the Act — is the fact that section 15 contemplates the Appeals Tribunal deciding fundamental issues concerning entitlement to benefits under the *Workers' Compensation Act* before the Workers' Compensation Board has had any opportunity to consider them.

Under section 15, panels of the Tribunal have found themselves, for example, being asked in one case to determine whether a particular condition falls within the definition of "industrial disease" under the *Workers' Compensation Act* where the categorization of that condition as an industrial disease has never been considered by the Board; in another case, to decide whether a particular employer fell within the Act's definition of a Schedule 1 employer in circumstances where the particular employer's business activity had not previously been categorized by the Board.

Decisions prohibiting the lawsuit and in favour of entitlement to benefits under the Act would in each case have put the Tribunal in the position of making the primary decision on issues that have traditionally been the business of the Workers' Compensation Board and with which the Appeals Tribunal is not equipped in terms of expertise and resources to deal effectively at the primary decision level. Furthermore, they are the type of decisions which other provisions of the Act, such as section 86g, obviously contemplate should continue to be decided in the first instance by the WCB.

Section 15 also presents a number of other obvious difficulties. One is the real possibility that in an accident situation involving more than one worker, the Appeals Tribunal may find itself considering an issue in an application under section 15 where one of the workers has elected to attempt to pursue a civil action while the same issue is being considered at the same time by the WCB upon application for compensation benefits by another worker.

Also, in every case in which the Appeals Tribunal decides that the Act prevents the civil lawsuit from proceeding, the plaintiff worker may be expected to apply to the Workers' Compensation Board for benefits. At that point the Board, in the exercise of its original jurisdiction to decide entitlement to benefits, is free to decide that the worker is not entitled. In such a case the worker would be left with the lawsuit having been terminated by the Appeals Tribunal, and with no benefits under the Act. The Tribunal would then find itself hearing the worker's appeal from the WCB's decision and having to consider on that appeal the same issue it had already decided in the Section 15 Application, but this time with the additional evidence provided by the Board's involvement.

The Tribunal's Hearing Panels have devoted considerable resources to understanding these difficult problems under section 15 and to the development of an approach that would allow the Tribunal to perform the duties defined for it under the terms of the section, while at the same time finding a way to give practical effect to the Board's initial decision-making prerogatives. See in particular Interim Decision No. '17.

10. Non-Organic Chronic Pain

A category of cases which has caused many of the Tribunal's Hearing Panels particular difficulty is the case which involves disabilities alleged to be caused by what is frequently described in reports and medical literature before the panels as "psychogenic pain magnification". These cases involve workers who many medical specialists seem to be satisfied are in fact disabled by levels of pain which cannot be explained by any discernible organic pathology in circumstances which are said also not to involve any category of psychiatric disorder to which the Board's policy concerning compensation for psychotraumatic disabilities would apply.

There is medical literature which indicates that the magnification is an unconscious or subconscious phenomenon that is outside of the voluntary control of the individual and that the pain is as real and disabling to

the afflicted worker as if it were indeed being generated by an organic lesion. The pain magnification is often said to be "caused" in part by the worker's *subconscious* interest in "secondary gains" of various kinds such as being relieved from having to return to an unpleasant job, continuing in the invalid role as the focus of the family's special concern and attention, etc., and by predisposing personality traits, cultural factors, and other similar matters.

Diagnoses of psychogenic pain magnification, sometimes referred to as non-organic chronic pain, typically appear in relation to injuries at work which are not of serious dimension originally. The condition is alleged to prolong a disability far beyond the time in which the original injury ought to have healed and to have the potential for turning a not very serious injury into a permanent disability.

It is apparent, moreover, that we may not be dealing here with isolated cases. Some of the evidence heard by various Tribunal Hearing Panels suggests that without special intervention at a very early stage, some 15% to 20% of all low-back injuries may have this propensity.

One of the major issues concerning entitlement to compensation benefits for disability caused by psychogenic pain magnification beyond the question of whether such disability does really exist, is whether or not it can be considered to be "work related". The question comes up because of the fact that the condition is often said to be "caused" by or maintained by the influence of the secondary gain factors and other non-work-related matters referred to above, with the injury at work being only the triggering factor. The Act specifies entitlement for disability which "results" from accidental injury at work.

In the reporting period, the issue arose primarily in connection with cases involving claims for temporary disability benefits under section 40 of the Act, but also presented itself in the Tribunal's leading case on pension appeals. It is expected that substantial expert evidence will be received by the Panel in that case concerning the nature and legitimacy of this phenomenon and its causal connection with the accident.

The position that finally emerges in respect of this type of case will obviously have significant implications both from the workers' and employers' points of view.

11. Fibrositis (Fibromyalgia)

The Tribunal had occasion to consider the current medical legitimacy of a disabling muscle pain condition referred to in the medical literature as "fibrositis" or "fibromyalgia". This is a condition which it is understood the WCB has not, in the past, recognized as being compensable. The reason for that policy was that the diagnosis of fibrositis was widely regarded within the medical profession as an admission by a medical practitioner that the muscle pain being reported could not be attributed to organic problems and was, indeed, at best a form of the psychogenic pain magnification referred to above — that is to say, it was "all in the patient's head."

In one very early case a Tribunal Hearing Panel was confronted by evidence submitted on behalf of a worker to the effect that fibrositis was now recognized by the medical profession as an organically-caused disabling condition typically arising from an accidental injury. The Hearing Panel was reluctant on such a major issue to rely solely on medical evidence submitted from the worker's perspective and arranged to have further expert evidence called. It ultimately heard testimony from eminent specialists in the field of rheumatology and in the study and treatment of pain to the effect that as a result of recent breakthroughs in medical research it is indeed now widely accepted within the medical profession that a condition — "a constellation of symptoms" — known as fibrositis or fibromyalgia does exist. It is a condition which produces disabling muscle pain symptoms caused by organic problems — problems possibly located within the patient's pain perception systems — which arise from experiencing high stress such as that often associated with an industrial accident.

An interim decision was issued in this case granting entitlement. The written reasons have yet to issue.

12. The Injury is the Accident

Another major issue which the Tribunal has had to consider is the definition of the phrase "injury by accident" as used in the *Workers' Compensation Act*. Board practice in Ontario has been to require any sudden injury to have been caused by something in the nature of an external chance event which could be identified as an "accident". Thus, in every such case, entitlement to compensation is predicated on finding some unusual or unexpected movement or occurrence from which the injury could be seen to flow.

The validity of that interpretation of the phrase "injury by accident" was recently challenged when a professional dancer who suffered injury from a burst blood vessel which occurred during the course of a routine dance performance was denied compensation by the Board because, in its view, there had been no *accident*. The dancer applied to the Ontario Divisional Court for judicial review. (The application to the Divisional Court was made before the Appeals Tribunal came into existence.)

The Divisional Court appeared to apply the definition of "injury by accident" approved years ago in English Court of Appeal and House of Lords decisions and subsequently adopted (in 1940) by the Supreme Court of

Canada. That definition holds that the phrase "injury by accident" means "accidental injury" and that any sudden unexpected injury is an accidental injury. The sudden unexpected injury is both an injury and an accident. The Court concluded in the dancer's case that the bursting of the blood vessel was itself the accident.

An Appeals Tribunal panel subsequently had occasion to consider that definition and to conclude that "injury by accident" in the Ontario *Workers' Compensation Act* means "accidental injury" and that, accordingly, in the case of any sudden unexpected injury which does arise out of or in the course of employment, the right to compensation does not depend in addition on there being both an injury and an accident. The analysis that led to that conclusion and an assessment of its implications for compensation cases may be seen in the Tribunal's *Decision No. 72*. The Divisional Court decision on which Decision No. 72 is based is being appealed by the WCB. The appeal is scheduled to be heard by the Court of Appeal in September. The WCB has applied to the Tribunal to reconsider its Decision No. 72 for the purpose of directing a stay in its implementation pending the result of the Board's appeal. A hearing of that application, at which one of the issues will be whether the Board has standing to make an application of this kind, is scheduled for October.

13. Availability for Work which is Available

An issue of some considerable importance which arises in a case now under consideration by a Tribunal Hearing Panel is whether the Board may reduce a worker's temporary partial benefits because of his refusal to make himself available for suitable work, without first satisfying itself that suitable work is in fact available to the worker.

The issue arises typically in a case where a worker, whom the Board has found to be temporarily partially disabled, continues to assert that he is at least for the time being totally disabled.

A non-working partially disabled worker is entitled to full compensation benefits under section 40 of the Act provided, amongst other things, that he be "available" for suitable work. A worker who declares himself totally disabled is obviously not a worker who is available for any work and such a declaration has always been accepted by the Board as evidence of breach of that condition and, therefore, cause for reducing the worker's benefit in accordance with the terms of section 40(3) — usually to 50%.

One difficulty with the Board's position in this respect is that the part of section 40 on which the Board must rely for the authority to reduce the worker's benefit in these circumstances appears to be open to being interpreted as requiring the Board, before it reduces the benefit, to satisfy itself that there was suitable work which would have been available to the worker had he not made himself unavailable for it. The relevant part of the section reads ". . . available for employment *which is available*." (Emphasis added).

It is an issue of considerable logistical importance to the Board since the actual availability of work for a partially disabled worker will often be problematic and the means available to the Board for satisfying itself on that issue are not readily apparent.

14. Miscellaneous Substantive Issues

In addition to the particularly prominent issues described above the Tribunal Hearing Panels have had occasion to consider or are in the course of considering a number of other significant issues. These include:

a) What are the limits to the "arising out of and in the course of employment" concept? This issue has been confronted in cases involving such things as parking-lot injuries, travel-to-work injuries, injuries during personal activities that are indirectly work related, injuries suffered during the personal time of "live-in" employees, amongst others.

b) What is the nature and the limits of entitlement to compensation for non-work-related sequelae of compensable injuries?

c) Are disabilities caused by work-place stress compensable under the terms of the Act?

d) What is the essential difference between a "disablement" as defined in the Act and an "industrial disease"? If, for example, rheumatoid arthritis were found to have been caused or aggravated by continuous intensive exposure to cold drafts, would it be a disablement or an industrial disease?

e) What constitutes a "disablement" as that term is used in the definition of "accident"?

f) What is the effect on entitlement to benefits of pre-existing diseases or of pre-existing dispositions which enhance a compensable disability, such as: degenerative disc disease, obesity, alcoholism, personality disorders, etc.?

g) Are Board doctors or staff subject to being summoned to testify before the Tribunal? If so, under what conditions may they be, should they be, summoned?

h) To what extent are procedural rulings by Board adjudicators during hearings before them subject to appeal to the Appeals Tribunal?

i) Are the Board's policies concerning the disposition of applications for commutation of pensions consistent with the terms of the Act?

N. CHALLENGES STILL TO BE MET

The challenges still to be faced of which the Tribunal is currently aware, include:

1. Demonstrating that the Tribunal is capable of disposing of 215 cases a month. The plan is to achieve this target by November and with the recent additional O.I.C. appointments we are confident that the plan is a reasonable one.
2. Installing a major integrated computer system successfully.
3. Delivering a sound decision in the Pension Appeals Leading Case. The issues in this case are complex, difficult and very significant.
4. Effecting successfully the transition in management terms from the scramble involved in the *construction* activity of these first months of the Tribunal's creation to an efficient, effective and professional operation that will get the job done in a predictable fashion day in and day out.
5. Reducing the time it takes to issue a decision after the hearing is complete.

   The time it has taken panels to issue decisions following a hearing has proven surprising to all concerned. Two to three months has been typical and instances of five to six months are not unknown. This is not, we understand, unfavourable compared to other tribunals, but is not what we had expected nor is it acceptable in the longer run.

   The issues concerning the meaning of the *Workers' Compensation Act* are proving to be rarely straight forward. Finding acceptable answers to those issues in a tripartite process at this stage of the Tribunal's life when each interpretation has so much significance for other cases, often involved an extended process with many drafts and several meetings. The need to ensure consistency among various decisions emerging at the same time introduces a further complication. As cases repeat themselves, the process will obviously become easier.

   The time available during the reporting period for the Vice-Chairmen to draft decisions and to meet with their panels has also been more limited than planned because of the increased hearing load occasioned by the delays in the appointments of part-time Vice-Chairmen.
6. The Tribunal believes that it has a role in training worker and employer representatives in the Tribunal's procedures and process. No progress has so far been made in addressing this role and it is hoped that initiatives in this direction may be possible in the near future.
7. The Tribunal is working towards the goal of being able to provide hearings in the French language. A mock French-language hearing of a typical Tribunal case has demonstrated that there is much to be done in the development of acceptable and uniform French language equivalents for workers' compensation terminology. It was also evident from that experience and from informal discussions with francophone Tribunal members and workers' and employers' representatives, that training in the conduct of a French-language hearing will be necessary not only for Panel members but also for representatives.
8. The Tribunal also has yet to find a French-speaking member representative of workers and that deficiency will of course have to be remedied as soon as possible.
9. The Tribunal's obligation to provide services in the French language is being generally met as far as administrative services are concerned. More attention will be paid to this, however, in the ensuing months.

O. FINANCIAL

FINANCIAL STATEMENT

The Tribunal's Financial Statement for its first fiscal period (October 1, 1985 to March 31, 1986) is as follows:

October 1, 1985 — March 31, 1986

Salaries, Wages & Benefits	$ 854,082.00
Transportation & Communications	67,257.00
Services	210,695.00
Supplies & Equipment	112,821.00
	$1,244,855.00

NOTE: The costs and expenses associated with the administration of the Appeals Tribunal form part of the administration expenses of the Workers' Compensation Board.

1986/87 BUDGET

The 1986/87 Budget as approved by the Ministry of Labour in May, 1986, totals $9.8 million of which $7.6 million is operating expenses and $2.2 million Capital Costs including furniture and office equipment and a computer system.

It must be noted that the 1986/1987 budget estimates are based on caseload estimates which because of the lack of experience with the new appeals process are, in the nature of things, more speculative than usual. They were also submitted with the acknowledgement of all concerned that the Tribunal's systems and processes are in an experimental stage and that adjustments might prove necessary. To the end of this reporting period the May estimates do appear, however, to be standing up.

It is to be expected that once the backlog and section 86o cases have been disposed of and the cases to be dealt with are reduced to the estimated steady-state level of about 150 per month, the Tribunal's operating expenses will be reduced.

WORKERS' COMPENSATION APPEALS TRIBUNAL

CHAIRMAN'S FIRST REPORT

APPENDIX A

PART-TIME MEMBERS OF THE TRIBUNAL

PART-TIME MEMBERS OF THE TRIBUNAL

Part-Time Vice-Chairmen

Arjun Aggarwal
Dr. Aggarwal was appointed to the Tribunal effective May 14, 1986. He is currently the coordinator of labour management studies at Confederation College in Thunder Bay, Ontario. He has past experience as a labour lawyer, labour consultant, conciliator, fact-finder, referee, and is an approved arbitrator.

Jean-Guy Bigras
Mr. Bigras was appointed to the Tribunal effective May 14, 1986. Mr. Bigras is a bilingual communications specialist, writing reports and speeches for government agencies and private public relations firms. He was formerly the Chief, Creative Services, General Secretariat of the National Capital Commission, and Manager of Information Services of the Export Development Corporation. He spent 10 years with the *North Bay Nugget*, first as a District Editor and finally as City and News Editor.

Ruth Hartman
Ms. Hartman was appointed to the tribunal effective December 11, 1985. She is currently in private practice with an emphasis on administrative appeals to provincial tribunals. She was previously counsel to the Ombudsman for five years.

Joan Lax
Ms. Lax was appointed to the Tribunal effective May 14, 1986. Called to the Bar in 1978, she has practised with the law firm of Weir & Foulds, with emphasis on administrative and civil law. She is currently the Assistant Dean, Faculty of Law, University of Toronto.

John M. Magwood
Appointed to the Tribunal effective December 11, 1985, Mr. Magwood was called to the Bar in 1936 and has been a prominent member of the Ontario Bar for over 40 years. Over the past eight years, he had been the chairman of the Canadian Executive Services Overseas (CESO).

William Marcotte
Mr. Marcotte was appointed to the Tribunal effective May 14, 1986. He is a mediator and is on the list of approved arbitrators with the Ministry of Labour. He teaches collective bargaining processes and educational organizations at the University of Western Ontario.

Eva Marszewski
Ms. Marszewski was appointed to the Tribunal effective May 14, 1986. She was called to the Bar in 1976 and is, at present, in private practice with special emphasis on civil litigation, family law, municipal law and labour law. She is a past member of the Ontario Advisory Council on Women's Issues.

John Paul Moore
Mr. Moore was appointed to the Tribunal effective July 16, 1986. Called to the Bar in 1978, Mr. Moore is currently a staff lawyer with Downtown Legal Services on a part-time basis, dealing with various administrative tribunals.

Marlene Philip
Ms. Philip was appointed to the Tribunal effective May 14, 1986. Ms. Philip, during her first year at the Bar, supervised the immigration section at Parkdale Community Legal Services, and subsequently carried on a private practice for approximately seven years involving immigration law, family law and administrative law. She has left the practice of law and is now a poet, author and freelance writer.

Sophia Sperdakos
Ms. Sperdakos was appointed to the Tribunal effective May 14, 1986. She was called to the Ontario Bar in 1982 and is currently with the law firm of Dunbar, Sachs, Appel. She was a chairperson and caseworker with the Community and Legal Aid Services programme at Osgoode Hall Law School.

Susan Stewart
Ms. Stewart was appointed to the Tribunal effective May 14, 1986. Ms. Stewart articled with the Ontario Labour Relations Board and was called to the Bar of Ontario in 1980. She has been a lawyer with the Ontario Nurses' Association for approximately four years and has participated in arbitration hearings as an advocate and union nominee.

Paul Torrie
Mr. Torrie was appointed to the Tribunal effective May 14, 1986. He is currently a partner in the law firm of Torrie, Simpson, practising in a wide range of litigation, administrative and corporate law. Mr. Torrie's additional work experience includes community legal work with the Osgoode Hall Community Legal Aid Services programme.

Peter Warrian
Mr. Warrian was appointed to the Tribunal effective May 14, 1986, and has extensive labour relations experience through his involvement with the Ontario Public Service Employees Union. He currently carries on a consulting business with government and union clientele and has written extensively in the labour relations field.

Members Representative of Employers and Workers: Part-Time

Shelley Acheson
Ms. Acheson was appointed to the Tribunal as a Member representative of workers effective December 11, 1985. She was the Human Rights Director of the Ontario Federation of Labour from 1975 to 1984.

Dave Beattie
Mr. Beattie was appointed to the Tribunal as a Member representative of workers effective December 11, 1985. He has 20 years of WCB experience representing injured workers or disabled firefighters in Appeals Adjudicator and Appeal Board hearings.

Frank Byrnes
Mr. Byrnes was appointed to the Tribunal as a Member representative of workers effective May 14, 1986. He was formerly a police officer and has been a member of the Joint Consultative Committee on Workers' Compensation Board matters.

Herbert Clappison
Mr. Clappison was appointed to the Tribunal as a Member representative of employers effective May 14, 1986. Mr. Clappison retired from Bell Canada in 1982 after 37 years of employment with that company. Upon retirement, he was Director of Labour Relations and Employment.

Claire Comeau
Ms. Comeau was appointed to the Tribunal as a Member representative of employers effective December 11, 1985. She has been involved with WCB claims administration at Falconbridge since 1971. Ms. Comeau retired from service with the Tribunal in July, 1986.

James Connor
Mr. Connor was appointed to the Tribunal as a Member representative of employers effective December 11, 1985. He will be retiring at the end of 1986 from a senior personnel relations position with Stelco.

William Correll
Mr. Correll was appointed to the Tribunal as a Member representative of employers effective May 14, 1986. He is retired from Inco, having been an employer representative on the Labour Board and on the Community Colleges Arbitration Board.

George Drennan
Mr. Drennan was appointed to the Tribunal as a Member representative of workers effective December 11, 1985. He has been the Grand Lodge Representative for the International Association of Machinists and Aerospace Workers since 1971.

Douglas Felice
Mr. Felice was appointed to the Tribunal as a Member representative of workers effective May 14, 1986, and is currently with the Canadian Paper Workers Union.

Mary Ferrari
Ms. Ferrari was appointed to the Tribunal as a Member representative of workers effective May 14, 1986. Her previous experience includes legal worker with the Industrial Accident Victims Group of Ontario.

Daniel Fryzuk
Mr. Fryzuk was appointed to the Tribunal as a Member representative of employers effective May 14, 1986. He is currently self-employed as a consultant in labour relations, safety, health and accident prevention to employers.

Patti Fuhrman
Ms. Fuhrman was appointed to the Tribunal as a Member representative of workers effective May 14, 1986. She was a caseworker at the Advocacy Resource Centre for the Handicapped and, more recently, was a worker with Employment and Immigration Canada.

Donald Grenville
Mr. Grenville was appointed to the Tribunal as a Member representative of employers effective December 11, 1985. He has an extensive personnel management background with Texas Gulf Sulphur Canada and more recently, Canada Development Corporation.

Roy Higson
Mr. Higson was appointed to the Tribunal as a Member representative of workers effective December 11, 1985. He recently retired from the Retail, Wholesale and Department Store Union. He was the international representative of Local 414 for nine years and has 29 years of union experience.

Faith Jackson
Ms. Jackson was appointed to the Tribunal as a Member representative of workers effective December 11, 1985. A Nurses' Aide at Guildwood Villa Nursing Home from 1972 to 1985, Ms. Jackson was a member of the Executive Board of the Service Employees International Union (SEIU) for six years.

Donna Jewell
A resident of London, Ms. Jewell was appointed to the Tribunal as a Member representative of employers effective December 11, 1985. She has been the assistant safety director of Ellis-Don Ltd. for approximately seven years. She managed the Ellis-Don WCB claims management and safety programs.

Peter Klym
Mr. Klym was appointed to the Tribunal as a Member representative of workers effective May 14, 1986. He is currently employed with the Communication Workers of Canada.

Teresa Kowalishin
Ms. Kowalishin was appointed to the Tribunal as a Member representative of employers effective May 14, 1986. She has been employed as a lawyer with the City of Toronto since her call to the Bar in 1979.

Allan MacIsaac
Mr. MacIsaac was appointed to the Tribunal as a Member representative of workers effective December 11, 1985. He has recently retired from the senior position of business manager and financial secretary, in Iron Workers Local 721.

Martin Meslin
Mr. Meslin was appointed to the Tribunal as a Member representative of employers effective December 11, 1985. He has over 30 years of experience in running his own business in the printing industry. He was a lay member of the Ontario Legal Aid Plan Appeals Committee.

John Ronson
Mr. Ronson was appointed to the Tribunal as a Member representative of employers effective December 11, 1985. He has an extensive background in personnel development at Stelco.

Frank Sampson
Mr. Sampson was appointed to the Tribunal as a Member representative of employers effective May 14, 1986. He is currently a workers' compensation officer of the City of Windsor.

E.A. (Ted) Seaborn
Mr. Seaborn was appointed to the Tribunal as a Member representative of employers effective July 1, 1986. His previous experience includes Chairman of the Brampton Planning Board for more than 12 years.

Ken Signoretti
Mr. Signoretti was appointed to the Tribunal as a Member representative of workers effective July 1, 1986, and has served on the Labour Council of Metropolitan Toronto as Vice-President since 1975.

WORKERS' COMPENSATION APPEALS TRIBUNAL

CHAIRMAN'S FIRST REPORT

APPENDIX B

TECHNICAL APPENDIX TO DECISION NO. 24

INTERIM DECISION NO. 24

TECHNICAL APPENDIX

Explanation of the Tribunal's Adjudication Process

The assumption at the root of the Tribunal's process design is that the "appeal" function contemplated for the Appeals Tribunal by the revised Workers' Compensation Act is not an "appeal" in the traditional sense of the term but is, rather, a process of rehearing. It is a process in which, in reviewing the issues relevant to an appeal, the Tribunal is mandated to consider again the same evidence considered at the final WCB appeal level and to hear new evidence, including, in appropriate cases, evidence obtained by the Appeals Tribunal on its own initiative.

This perception of the Appeals Tribunal's role is derived in the first place from the historical tradition in Ontario where each level of the "appeal" processes in workers' compensation matters since the introduction of the Workmen's Compensation system in 1915 has typically been, in whole or in part, a rehearing process. The WCB Appeal Board, which the Appeals Tribunal replaces and whose powers it has largely inherited, dealt with appeals by rehearing cases, with appellants and sometimes respondents typically testifying and/or calling other witnesses, and the Board initiating its own investigations, particularly with respect to medical issues.

The intention of the legislature in this respect may be seen from the fact that the Act's instructions to the Appeals Tribunal concerning the basis of its decisions are identical to the instructions to the Workers' Compensation Board concerning the basis of its decisions. In each case the decisions are to be made "upon the real merits and justice of the case". See Section 86m which makes Section 80 applicable to the Tribunal as well as to the Workers' Compensation Board.

That the Tribunal's role is to rehear cases in the above sense may also be seen from the fact that as part of its adjudicative role the Tribunal has been given explicit investigative and issue-agenda setting functions not usually found in standard adversarial systems of adjudication.

In the revised Act, the investigative function for the Appeals Tribunal is clearest with respect to the medical evidence. Section 86h provides for the appointment by the Lieutenant-Governor-in-Council of a roster of medical practitioners. From that roster of practitioners the Appeals Tribunal "may obtain the assistance of one or more of them in such a way and at such time or times as it thinks fit, so as to better enable it to determine any matter of fact in question in any application, appeal, or proceeding."

In addition to that general mandate, the Act gives the Tribunal the power to authorize the Chairman or a Vice-Chairman to enquire into appeals to decide whether or not the worker involved should submit to a further examination by one or more of the medical practitioners on the appointed roster.

That the investigative function of the Tribunal is intended to extend beyond the medical question is demonstrated, in part, by the fact that the Appeals Tribunal has been given many of the same general investigative powers as the WCB itself. These include the power to enter into any premises where work is being done by a worker to inspect and view any work material, machinery, appliance, or article found there and to interrogate any person.

The Tribunal's instructions to base its decisions upon the real merits and justice of the case also anticipate an investigative and issue-setting function as a necessary adjunct to the Tribunal's hearing and adjudication role.

The need for the Tribunal to have an investigative and issue-setting function as part of its adjudication role also arises implicitly from two of its particular operating circumstances. One of these operating circumstances is the fact that the Tribunal's cases inevitably involve, in one way or another, claims against a "public" fund. The other circumstance is that there are routinely no persons responding to the applications or appeals the Tribunal is called upon to decide.

The unique circumstance of the routine absence in Tribunal proceedings of any respondent to an appellant's or applicant's case, arises because, (1) in the majority of injured workers' appeals the employer does not appear (This is either because he elects not to, or because he has disappeared — gone out of business, become bankrupt, etc.); (2) in all employer assessment appeals there appear to be no natural respondents, and (3) the WCB does not appear in any case to defend its own decisions. The routine absence of respondents is a circumstance which undermines for the Tribunal a number of important assumptions about traditional adjudication processes.

To say that the decisions of the Appeals Tribunal involve claims against a public fund is not, of course, strictly accurate. The Accident Fund is not a public fund in the ordinary sense of the word since only employers contribute to it. It is public, however, in the sense that it is made up of financial contributions imposed by law on a large number of unrelated organizations or individuals. The interest of those various organizations and individuals are at stake in every case heard by the Tribunal, since, ultimately, the volume of claims against the fund determines the amount of contribution for which they will each be assessed. Furthermore, as Professor Weiler has noted in the report which preceded the creation of this Appeals Tribunal, excessive claims against the

accident fund are also contrary to the interest of workers generally and of the public at large. From a long-term perspective, profits diverted from an employer's enterprise to pay unnecessary or excessive compensation assessments either reduce the amount available for wages and benefits or increase the costs of goods and services.

The fact that the interests of employers, of workers in general, and of the public, in ensuring that the accident fund is not unfairly or unnecessarily charged are routinely not represented by any person appearing before the Tribunal, imposes special responsibilities on the Tribunal. And, even in cases where both the worker and employer are represented there is no guarantee that the interests of the fund will be represented. Very often, for example, the employer will only be interested in asserting the right to have the cost of the compensation award transferred in whole or part to the Second Injury Enhancement Fund — a means of sharing the cost implications of the award amongst all members of the fund.

The implications for the Tribunal of the constant presence in the cases which it hears of unrepresented interests may be seen from the following simple illustration.

Consider the common case of a compensation claim that has been refused because the WCB did not believe the injury occurred at work. The worker appeals to the Tribunal and the employer chooses not to contest the appeal. It is not, we think, possible to argue that because the worker's assertions are uncontested, the Tribunal must merely accept them. In analysing the Tribunal's role and determining the appropriate process we have had to recognize that before allowing such an appeal the Tribunal would have an obligation to the public — to the Accident Fund — to satisfy itself that the claim was in fact well founded. That obligation would require the Tribunal to be active in the determination of the issue agenda and in considering and pursuing the need for further investigations.

In the example cited, and potentially in most cases to some degree, the responsibility arising from the presence of unrepresented interests, requires for the Tribunal not only an investigative and issue-setting role during the preparation for the hearing, but also an interventionist role in the conduct of the hearing.

It could be argued that the Workers' Compensation Board ought to appear by counsel and itself defend its decision in each case. If the Board were to appear before the Tribunal to put the case for the "public" interest, the Tribunal could revert to the classic, aloof role of the traditional adjudicator.

The WCB, however, has taken the view that it does not intend to be involved in the defence of its own decisions at the Appeals Tribunal. There are current indications that in special circumstances where the Tribunal is addressing seminal policy or jurisdictional issues the Board may decide to appear in support of particular policies. The Board has also indicated a willingness to provide Tribunal hearings with any information or background that a panel may need in addressing any policy questions in any case. But in the majority of cases, particularly in those in which the appeal will turn on individual factual or medical issues, the WCB does not intend to appear in defence of its decisions. And the Tribunal shares the WCB's view that it would be inappropriate for the Board to appear before the Appeals Tribunal in defence of its own decisions on individual factual or medical issues. Such an appearance would be comparable to a judge appearing before an appeal court to defend his or her own trial decisions.

The Tribunal's investigative and issue-setting functions are also implicitly mandated by the non-adversarial, bureaucratic tradition in the determination of rights in Workers' Compensation matters. In 1915, the subject of compensation for industrial injuries was removed from the adversarial system and from the jurisdiction of the courts and became, in effect, a no-fault insurance scheme. The relationship of the worker to the WCB process became one of insured to insurer rather than one of plaintiff to court. At the Workers' Compensation Board, workers are not expected to define their rights or prove their cases. The workers bring the injury to the Board's attention and the Board identifies and defines the right to compensation and does the investigation necessary to answer the questions which the Board identifies as relevant. Under the Workers' Compensation system rights are not supposed to be dependent on a worker's or employer's own advocacy skills or on access to skilled representatives.

The representation of workers and employers in the Board's processes by representatives or advisers has, of course, in fact emerged — as a matter of common practice — as a means of facilitating the progress of the case through the Board's procedures and increasing the confidence of workers and employers that the Board is in fact hearing and understanding their position. It remains, however, a fundamental feature of the system that representation is not necessary — that the worker's and employer's rights are not being determined in an adversarial process. If that be true of the Workers' Compensation Board's process it must also be true of the Appeals Tribunal's process. The Tribunal is designed to be a component of the same system and must be committed, in this panel's view, to the same theory of adjudication. Thus if a worker presents an appeal on an obviously incomplete case, in our opinion the Appeals Tribunal cannot be in the position of saying, "too bad, if only you had known more about it". The Tribunal must have the power to intervene and deal with the case — as the Act instructs — on its true merits.

In short, the investigative and issue-setting functions of the Appeals Tribunal are an adjunct to its hearing and adjudication role which are explicitly and implicitly mandated by its Act.

In designing a process to accommodate these investigative and issue-setting functions, the Tribunal has been very concerned to ensure that those functions are kept separate from its decision-making role. A decision-making body which has an investigative and issue-setting role is in danger during its investigative or issue-setting activity of developing a bias — a fixed disposition concerning the nature of the case and the desirable outcome. In assessing evidence presented at a hearing or in considering arguments of partisan counsel, it may be unable to effectively shake that bias. Sensitivity of our courts to this particular danger may be seen in the practice that has arisen with respect to pre-trial procedures wherein judges engaged in a pre-trial consideration of cases are precluded from participating in the adjudication of the case.

The employment of Tribunal counsel and the utilization of special case direction panels are designed to allow the Tribunal's investigative, issue-setting functions to be pursued while ensuring the necessary degree of objectivity and detachment on the part of the actual decision-makers.

The Tribunal counsel concept also provides the Tribunal with an appropriate mechanism for culling the WCB files and excluding from the hearing process any documents or materials that are irrelevant or unfairly prejudicial. The Tribunal is committed, as one might expect, to the adjudicative principle that in respect of any issue relevant to his or her concerns, a party to an adjudicative hearing must receive an appropriate opportunity to clarify, test or challenge any information or evidence which the adjudicators receive. Accordingly, interests of efficiency as well of fairness require that Hearing Panels not receive any unnecessary or irrelevant material or information.

The WCB file is a chronological collection of paper generated in the course of a worker's association with the Board. Files a foot thick are not uncommon. The Tribunal's counsel is able to comb through those files and, with the assistance of the parties and their representatives and under the general supervision of case direction panels, to identify that part of the information or material which is, in fact, relevant, and to prevent the Hearing Panel from seeing any irrelevant or unfairly prejudicial material.

Finally, the existence of Tribunal counsel and of case direction panels provides a structure for an appropriate pre-hearing process in which in advance of the hearing the issues can be defined, the areas of agreement as to facts and law settled and the outline and dimensions of the evidence to be called, identified. That is a process which is essential not only to the efficiency of any adjudicative tribunal's operation and of any hearing but also in the long run to the quality of an adjudicative tribunal's decisions. In the circumstances of this Tribunal where there is typically only one party to a proceeding, if there were no one playing the role of Tribunal counsel it is difficult to envisage how that pre-hearing preparation process could be accomplished by this Tribunal without raising concerns of apprehended bias in the Tribunal's decision-making process.

DATED at Toronto this 27th day of March, 1986.

SIGNED: S.R. Ellis, B. Cook, R. Apsey.

WORKERS' COMPENSATION APPEALS TRIBUNAL

CHAIRMAN'S FIRST REPORT

APPENDIX C

CHAIRMAN'S MEMORANDUM TO VICE CHAIRMAN

WORKERS' COMPENSATION APPEALS TRIBUNAL

MEMORANDUM

TO: Vice-Chairman XXX
FROM: S.R. Ellis DATE: XX, 1986
RE: *XXX—Decision No. XXX*

I am writing to you concerning your draft decision in the above case.

I appreciate that any communication between the Chairman of the Tribunal to a Vice-Chairman acting in the role of the Chairman of a Hearing Panel concerning the Panel's proposed decision in a particular case, is implicitly a matter of general concern from an administrative law point of view. I have chosen to put these communications in writing rather than talk to you informally in order to provide a record of them and to make them as clear as possible.

Accommodating the independence of Hearing Panels to the Tribunal's commitment to building a coherent and consistent body of decisions which will serve in future as a guide to the like treatment of like cases is an obvious problem when one considers that the Tribunal is faced with a statute which has not previously been interpreted by a judicial or quasi-judicial body which has given reasons for its interpretation of the Act; the Tribunal's adjudication process is novel, and the Tribunal is relying for its decisions on about 22 part-time or full-time Vice-Chairmen, and approximately 40 part-time or full-time members, none of whom have had previous adjudication experience in the compensation field. Maintaining reasonably uniform Tribunal standards of decisions and of the decision-making process under these circumstances is an obvious problem.

The Tribunal is a specialized institution whose decisions are intended to be influential in the development of policy and process in the worker's compensation field. It cannot be viewed as simply an administrator of a large number of independent and unrelated adjudicators.

In these circumstances, it has been my view that the Tribunal Chairman's Office has a duty to review proposed decisions for the purpose of providing individual panels with the following:

1. Information about potential inconsistencies with other Tribunal decisions.
2. Information about compensation law which the Panel has not considered but which is known to the Chairman's Office and which appears to be relevant and which other Panels may have considered or be considering in other issues of a similar nature. In some cases, if this information is especially significant to the decision, it will be appropriate for the Panel to send this information to the parties and to invite further submissions.
3. Identification of apparent problems with the completeness, clarity or logic of reasoning which may be disclosed by reading the proposed decisions.
4. Information and advice about apparent shortcomings in the adjudication procedure or process described or reflected in the proposed decision.
5. Identification of apparent shortcomings in the evidence base for any decision of fact or medical fact, which a reading of the proposed decision may disclose.
6. Instructions concerning the format of the decision.

In this process the Chairman is not, of course, entitled to express to a Vice-Chair or Panel a personal opinion as to what the decision on any substantive issue ought to be. Decisions on substantive issues are the Hearing Panel's to make without interference from anyone.

I hope you will agree that a Chairman's observations within the limits described above are not inappropriate, and that the following observations about the proposed decision are within those limits.

In the first place, I share the concern that the Panel has not had the benefit of any argument in support of the WCB's interpretation of Section XXX.

Given that it could result in a substantial revision of all the . . .

. . . the acknowledgment in your draft that the Panel does not know the reasons for the Board's apparent reading of Section XXX identifies what I think many people would view as a significant deficiency in the information base that reasonably ought to be required for a decision as to the meaning of such a Section.

The failure to acknowledge that there is another way to read the section also, in my view, opens the reasoning to fair criticism. The reading outlined in the memorandum of the Counsel-to-the-Chairman is, arguably, as "clear" a plain-meaning interpretation of the section's wording as the one you have accepted. It would strengthen the decision to acknowledge the other possibility and explain explicitly why it is right to conclude that the Legislature intended whatever interpretation the Panel thinks is right. To base the decision on the conclusion that the plain meaning of the wording is "clear" when it is not obvious that it is, leaves the decision vulnerable.

I would suggest that the WCB be given an opportunity before the decision is finalized to provide the Panel with any information it may have as to what the Board's interpretation generally of Section XXX is and why that interpretation was adopted and any submissions it might like to make as to why that was a proper interpretation of the section.

The worker and the employer *or* their representatives would, of course, have to receive copies of any communication between the Panel, Tribunal counsel and the WCB in this respect and be given such opportunity as either may request to challenge or respond to the WCB's information and submissions.

cc: Counsel to the Chairman.

WORKERS' COMPENSATION APPEALS TRIBUNAL

CHAIRMAN'S FIRST REPORT

APPENDIX D

MEDICAL ASSESSOR POLICY

WORKERS' COMPENSATION APPEALS TRIBUNAL

Policy Concerning the Authorized List of Medical Practitioners

INTRODUCTION

The Workers' Compensation Act was substantially revised in 1985, and one of the major reforms was the creation of an external Appeals Tribunal. The Appeals Tribunal is a new organization that came into existence on October 1, 1985. It is separate from and independent of the WCB. Its role is to hear appeals from decisions of the WCB.

The Appeals Tribunal has been given the power to initiate further medical investigations if it thinks it is necessary in order to determine any medical question at issue on an appeal. Such investigations, including further examination of a worker, may, however, only be referred to qualified medical practitioners on a list of authorized practitioners appointed by the Lieutenant Governor in Council (the provincial Cabinet).

THE APPOINTMENT PROCESS

Under the terms of Section 86h of the Act, appointments to the authorized list can be made only after the views of "representatives of employers, workers and physicians" have been requested and considered.

Medical practitioners identified by the Appeals Tribunal as candidates for appointment to its authorized list will be asked to allow their names to be entered in the appointment process. The names of those who agree to stand for appointment together with their professional resumes will then be circulated to the members of the Tribunal's Advisory Group which is composed of organizations representative of workers and employers. The views of "representatives of physicians" will have been obtained through the offices of the Tribunal's Medical Counsellors prior to a medical practitioner being asked to stand for appointment.

The views obtained from the Advisory Group will be considered by the Tribunal in determining whether or not to proceed to recommend to the Government the appointment of any particular practitioner. The names of practitioners recommended for appointment will be forwarded to the Minister of Labour with resumes and a summary of any views concerning any appointment which have been received from the Advisory Group or from the profession through the Medical Counsellors.

The Tribunal's recommendations will be processed through the government's own appointments process and the government, of course, has the discretion not to accept any particular recommendation.

Appointments will be confirmed by Order-in-Council approved by the Cabinet and will be for a three-year term, subject to renewal.

SERVICES TO BE PROVIDED

Practitioners on the authorized list will be asked to assist the Tribunal in a number of possible ways. Typically, they will be asked to examine a worker, study the medical reports of other practitioners, and give their opinion on some specific medical question. Practitioners specializing in a particular field might be requested to assist in educating the Tribunal or one of its Hearing Panels in a general way about some medical theory or procedure. Or they might be asked for an opinion as to the validity of a particular medical theory which a Hearing Panel has been asked to accept, or to comment on the representative nature, quality or relevancy of a selection of medical literature that the Tribunal may have been asked to consider.

The opinions will normally be sought in the form of written reports containing the history, observations, and test results on which the opinion is based. Copies of the reports will be made available to the worker, employer and the WCB, and references will be typically made to the report in the Tribunal's reasons for its decisions.

It is expected that a written report will normally be sufficient, and attendance at the hearing of the case in question will not be required. On occasion, however, it will be apparent that a Hearing Panel must have the opportunity to question the practitioner for purposes of clarification and explanation of the opinion, if it is to be able to decide the medical issue with confidence. In those cases, the practitioner will be asked to appear at the hearings and give oral evidence. On those occasions, the participating parties, as well as the Hearing Panel, will be given the opportunity to discuss the opinion with the practitioner.

Where the practitioner is asked to attend the hearing, every effort will be made to minimize the inconvenience and the impact of the practitioner's usual schedule. Special compensation for attendance at hearings will take account of the schedule disruption associated with such attendance, the fact that appearances at Appeals Tribunal hearings impose an extra burden on most physicians by reason of their unfamiliarity with the process, and the fact that some preparation time will usually be required. The tariff arrangements that apply generally to the services described in this paper are set out below.

CONFLICT OF INTEREST RULES

Because of the commitment of the Appeals Tribunal to maintaining both the reality and the appearance of independence from the WCB, consideration had been given in the development of this policy to the possible need for imposing on practitioners appointed to the authorized list a restriction against accepting consulting work from the WCB. The practicalities of the situation, however, have convinced the Tribunal that such a restriction would be too costly in terms of the number of experienced practitioners who would be thereby lost to the Tribunal's service. Accordingly, the only restrictions that will apply are those that are specified in the Act itself. The Act provides that *without the written consent of the parties*, practitioners shall not be asked to assist the Tribunal where they or any partner of theirs have, (i) examined the worker whose claim is the subject matter of the application, appeal or proceeding, (ii) treated the worker or a member of the family of the worker, (iii) acted as a consultant in the treatment of the worker or, (iv) acted as a consultant to any employer involved in the application, appeal or proceeding.

Acting as a consultant for the WCB in respect of the claim in question would, of course, also preclude a practitioner from being retained by the Appeals Tribunal to provide assistance in that case.

AMOUNT OF WORK CONTEMPLATED

The appointment to the Appeals Tribunal's authorized list of practitioners would not constitute any guarantee of any referrals. Although it is not the Tribunal's intention to appoint excessive numbers of practitioners, there will be a number appointed in each specialty, and where practicable in each of the Province's major centres. And it is not possible at this stage of its development for the Tribunal to do more than estimate its likely requirements.

Appointed practitioners may be assured, on the other hand, that the Tribunal's demands on their time will not in any event be excessive. The Tribunal would not expect it to amount in any individual practitioner's case to more than two or three referrals a month.

The Tribunal will require assurances from practitioners who allow their names to stand for appointment, that the Tribunal's references will be given special priority in their schedules. The workers the Appeals Tribunal will be dealing with will, in the nature of things, have experienced an already excessively prolonged process since the injury occurred, and the Tribunal is committed to minimizing as much as possible the delays associated with the appeal process.

FEES

The fees paid for the services of practitioners on the authorized list will duplicate the WCB's policies. As of March 31, 1986, we understand that the WCB's Schedule of Benefits for Physicians' Services will be about 132 per cent of the OHIP Schedule (which is slightly ahead of the OMA's 1985 schedule). Future changes in the WCB policy will be tracked by the Tribunal. The Tribunal will also apply the WCB's policies concerning different categories of consultations with adjustments to the consultation fee in the Schedule of Benefits based on whether the consultation can be fairly characterized as "Standard", "Extensive" or "Complex".

For appearances at Tribunal hearings, the Tribunal will pay a range of $75 to $150 per hour of preparation time or actual interference with the practitioner's schedule, up to a maximum of $350 to $750 per day of hearing, depending on the practitioner's qualifications and the nature of the appearance. Reasonable travelling and accommodation expenses will also be paid. The Tribunal proposes to experiment with telephone attendances and video-taped evidence.

MEDICAL SERVICES LIAISON OFFICER

The Tribunal will employ a Medical Services Liaison Officer who will co-ordinate referrals, expedite reports, arrange for hearing attendances, administer accounts, etc.

WORKERS' COMPENSATION APPEALS TRIBUNAL

CHAIRMAN'S FIRST REPORT

APPENDIX E

EXTRACT FROM TRIBUNAL'S INTERIM REPORT IN THE PENSION APPEALS LEADING CASE

SETTING THE ISSUE AGENDA

1. The submissions at the pre-hearing conference concerning the substantive issues properly before the Hearing Panel in this case raise another threshold question: What determines in a particular case the issues which the Appeals Tribunal must hear and decide and those which it may not? This question has been the focus of much internal attention by this Tribunal since its inception.
2. The submissions by the parties and others on what the issues to be considered in this appeal could or could not be, suggested various theories of issue definition.
3. One such theory is that the issue agenda is entirely in the hands of the parties in the sense that if the parties do not put any particular question in issue, it is not open to the Tribunal to do so.
4. Another theory seems to be that the issues to be considered are limited to those explicitly addressed by the Appeals Adjudicator's decision. On that theory, if the Appeals Adjudicator fails to deal with an issue, the Tribunal is required to ignore it as well, even though it may have been raised explicitly by one of the parties during the Appeals Adjudicator's hearing.
5. Still another proposition is that the Tribunal cannot go beyond the issues explicitly identified and defined by the parties or their representatives during the Appeals Adjudicator proceedings. The employer submitted, for instance, that the fact that the worker's representative had argued before the Appeals Adjudicator that the August, 1983, assessment of 30% for the back and 2% for the thumb was the "correct assessment", prevented the Appeals Tribunal from considering the possibility of a pension entitlement higher than 30% plus 2%. The worker's representative has indicated, however, that in this appeal it is the worker's intention to argue that a 100% pension is appropriate.
6. There are a number of particular factors which must be borne in mind in considering how the issue agenda is to be determined in an appeal to this Tribunal. These include the following:
   a) The *Workers' Compensation Act* gives to the Appeals Tribunal the same basic instructions it gives to the WCB, *viz*: to base its decisions "upon the real merits and justice of the case"; not to be bound by "strict legal precedent", and to give "full opportunity for a hearing". (See Sections 86m and 80.)
   b) The Act also gives to the Tribunal the identical power it gives to the WCB of "determining" a number of specific issues — including the issue of particular interest in this case, *viz.*, "the degree of diminution of earning capacity by reason of any injury". (See the reference in Section 86g(1) to Section 75(2).)
   c) There is ample judical authority for the proposition that workers' compensation legislation is to be regarded as remedial legislation and interpreted broadly and non-technically from the point of view of facilitating the expeditious and fair treatment of injured workers' claims.
   d) The compensation system of claim determination is not an adversarial system. Compensation claims were removed from the adversarial system in 1915 and, since then, it has been a no-fault insurance system where the relationship of a worker to the system is not one of a plaintiff to a court, but one of an insured to an insurer. The insurance scheme analogy can be pushed too far as it does not take account of the rights that have been extended to employers to participate in particular proceedings, but at the very least it is apparent that the rules and traditions of the adversarial system can be at best of only persuasive authority in the development of this Tribunal's process.
   e) The non-adversarial nature of the system is demonstrated, and the issue-definition process complicated, by the typical presence in compensation proceedings of unrepresented interests. In worker appeals to this Tribunal it is commonplace for employers not to appear at all. Usually they elect not to come, but not infrequently — particularly in the construction industry — they simply do not any longer exist.
   f) When employers do appear it is often for the purpose, in whole or in part, of achieving a transfer of responsibility for the costs of the claim from themselves to all employers who contribute to the accident fund. This is accomplished through having the cost of the claim, or part of it, charged to the Second Injury Enhancement Fund. The interests of the other employers in such a transfer are never represented. On all appeals by employers of the Board's employer assessment decisions, workers do not appear and the opposing interests of other employers are, again, never represented.
   g) The WCB itself does not ordinarily appear in defence of its decisions of policies.
   h) The non-adversarial nature of the system is also evidenced, and the process of issue-definition further complicated, by the nature of the representation of parties who do appear. In compensation systems it is a tradition — and an article of faith — that the process must accommodate the effective participation of workers or employers who are unrepresented or who are represented by non-professional representatives. Professional representation — by worker or employer advisers or consultants, experienced in compensation advocacy — is, of course, increasingly common. But workers regularly appear before this Appeals Tribunal without any representation or represented by a priest, a relative, an alderman, an M.P.P., etc. Employers when they do appear are more often than not represented by staff members such as personnel managers who typically do not have compensation advocacy experience.

i) Absent from the process of party-determination of issue in appeals to this Tribunal is the discipline imposed in the courts by the concept of costs. In this Panel's view, the Appeals Tribunal's power to award costs is problematic. With the availability of free representation for workers from the Office of the Worker Adviser, legal services clinics, and the Legal Aid Plan, there is virtually no cost exposure to a worker in bringing an appeal, or defining issues. The same is now true with respect to employers represented by the Office of the Employer Adviser.

7. Taking the foregoing factors into account, and for reasons that are set out at greater length in the Technical Appendix to the Tribunal's Interim Decision No. 24, the Appeals Tribunal has concluded that its adjudicative role includes investigative and issue-setting functions that are more intrusive than is usual in traditional adjudicative systems. In particular, it has concluded that it has the jurisdiction and the duty to determine itself the agenda of issues that must be considered in any particular appeal.

8. The Tribunal's power to determine the issues it will consider is, of course, limited by the terms of Section 86g(2). That Section reads as follows:

> (2) The Appeals Tribunal shall not hear, determine or dispose of an appeal from a decision, order or ruling of the Board unless the procedures established by the Board for consideration of issues respecting the matters mentioned in clause (1)(b) or (c) have been exhausted, and the Board has made a final decision, order or ruling thereon.

9. Section 86g(2) is not without its difficulties in application. Construed strictly, it has the potential for creating a process in which workers and employers would be bounced back and forth between the Tribunal and the Board to no practical purpose. Take, for purposes of illustration, an absurd instance. An Appeals Adjudicator decides that as of — say — January 10, 1984, a worker has recovered from his temporary disability. The Adjudicator confirms discontinuation of compensation on that date. The worker appeals to this Tribunal.

10. The Tribunal's right to hear the appeal under the terms of Section 86g(2) is clear since the Board's procedures for considering the issue of entitlement as of January 10 have been exhausted. However, if the Tribunal allows the appeal, Section 86g(2) could be construed as limiting it to deciding only that on January 10, 1984, the worker continued to be partially disabled — the WCB's procedures for considering the issue of entitlement as of January 11 not having been exhausted. The worker would then have to go back to the Board for a determination of his entitlement in respect of January 11, back to the Tribunal on an appeal, back to the Board re January 12, back to the Tribunal, etc., etc. Obviously, some practical accommodation would emerge in this instance, but the example illuminates a problem with Section 86g(2) that is a real problem with many substantial facets.

11. The general purpose of Section 86g(2) is clear. The legislature obviously wants to ensure that the WCB's special expertise, experience and policy perspective is allowed its usual and proper role before the Appeals Tribunal becomes involved. It is equally clear, however, that the legislature cannot be taken to have intended to require a multiplicity of proceedings to no practical purpose.

12. Having regard to the foregoing factors, in selecting in any particular appeal the issues it will hear and determine the Appeals Tribunal intends to be governed by the following criteria:
    a) The parties' views as to the issues the Tribunal should address will be given great weight and only for substantial reasons will they not be followed.
    b) The set of issues that were explicitly *or implicitly* "present" in the adjudicator's decision are the starting point of any issue identification process, and the deletion or addition of issues from that basic set will require substantial reasons.
    c) In the interest of efficiency and speed, appeals should not be complicated by the Tribunal's addition of issues unless there is a clear necessity.
    d) The Tribunal's bottom-line question in selecting issues is, What issues is it essential to consider in determining the true merits and justice of this case having proper regard for all competing interests?
    e) Where an issue arises and it is apparent that the WCB has special expertise, experience, or a policy perspective in respect of that issue, which in the proceedings to date have not had their appropriate play, the Tribunal must refer that issue back to the Board for determination in this usual processes.
    f) In considering an application of the policy in the preceding paragraph, the Tribunal must also have appropriate regard for the competing policy of not prolonging the WCB-Appeals Tribunal decision-making process to no practical purpose.